United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

76-7184 & 76-7185

United States Court of Appeals

For the Second Circuit.

B

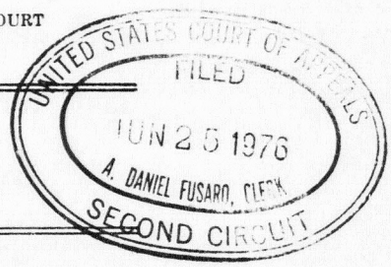
THOMAS J. CHIARELLO,
Plaintiff-Appellee-Appellant,
against
DOMENICO BUS SERVICE INC. and HENRY GIRWOOD,
Defendants-Appellants-Appellees.

Action No. 1.

ANGELA CHIARELLO,
Plaintiff-Appellee-Appellant,
against
DOMENICO BUS SERVICE INC.,
Defendant-Appellant-Appellee,
and
HENRY GIRWOOD,
Defendant.

Action No. 2.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.



APPENDIX.

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Q You examined the hospital record?

A Yes.

Q And you have a man that was complaining of pain in his back when you examined him?

A Correct.

Q Wasn't it important to you to determine why he was having pain in his back, if he was having pain in his back?

A That was the purpose of my examination, yes.

Q All right. And as part of that, you told us about all the neurological examinations you did do. How come you didn't consider these in your logical signs?

MR. SCHLUTZ: Objection, your Honor.

THE COURT: Overruled.

A I did consider them. I had this material available. I read this.

Q I know you did.

A Right.

Q Why is it not reported?

A I did report that I reviewed it.

Q Why isn't, very simply, doctor, the marked epidural adhesion referred to in your report at all?

MR. SCHULTZ: First of all, your Honor, I object. The report is not in evidence. This doctor's report is not in evidence.

MR. LASSOFF: I will offer his report in evidence, your Honor.

Do you have the original?

THE COURT: He's now offering your expert's report in evidence. Do you object to it?

MR. SCHULTZ: I don't even know where it is, to tell you the truth. Do you have a copy of it?

MR. LASSOFF: I have a copy, yes, sir.

THE COURT: Any objection?

MR. SCHULTZ: No.

THE COURT: All right.

MR. SCHLUTZ: Wait a minute, your Honor. Let me see what it is. There may be one thing that may be objectionable, your Honor.

If your Honor please, I would have no objection to his opinion, but in this report are statements of other doctors who have not come here to testify.

THE COURT: We've been through this ten million times. If you want to argue to the jury--

MR. SCHULTZ: Doctor--

THE COURT: Will you wait until I finish?

MR. SCHULTZ: Yes, sir.

THE COURT: If you want to argue to the jury that the plaintiff has been deficient in failing to produce the

doctors who actually performed the operation, that's something you argue to the jury going to the weight of the testimony. It doesn't keep this report out. What's your next objection to it?

MR. SCHULTZ: If your Honor please, it deals with reports made by Dr. Leone and Dr. Gervin. He didn't bring them and I don't want to let them in because--and supply what he didn't bring and therefore I will object to it.

THE COURT: But he's your expert who you put on the stand who said he read them.

MR. LASSOFF: He never examined any report of Dr. Leone, he just refers that Dr. Leone was treating the man.

MR. SCHULTZ: Objection, your Honor.

THE COURT: I gather your question, Mr. Lassoff, is didn't the witness think that the finding of the epidural scarring was of such importance that he should have referred to it in his report in evaluating the condition of the plaintiff?

MR. LASSOFF: Exactly, your Honor.

THE COURT: That's the question to you, doctor.

MR. SCHULTZ: Excuse me, your Honor, before that did you admit this report into evidence?

THE COURT: Of course I did.

MR. SCHULTZ: You did?

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THE COURT: Sure.

xxxx (Plaintiff's Exhibit 14 received in evidence.)

A If I could just go to my report a second.

Q Sure, doctor.

THE COURT: Look at it all you want. You can read from it if you want.

A I have reviewed a note of Dr. Laurie E. Rennie, apparently the patient was hospitalized and I had a hospital discharge which I also reviewed.

January 26, '73, was January 31, '73 when a myelogram was done. I have noted the reports of the chart of Dr. Rennie's. Apparently surgery was done--no surgery was done and the patient went back to New York. Then he was seen--I reviewed the hospital records and I have numbered the records 73-4727-1. Date of admission, 2/2/73, date of discharge, 2/14/73.

MR. LANSOFF: That's the hospital record we're talking about, your Honor.

THE COURT: This is the Golden Isles Hospital?

A Yes. I did not start on page 1 and wind up with the last page. I didn't count the pages and requote all of the things. It is, as you say, in evidence. I have reviewed it. The note is in there, there are many other things that I did not include in my report. It's assumed that the patient

was hospitalized, a myelogram was done, the operation was performed. There's pathological diagnosis in there, there's x-ray diagnosis in there. None of these are included in my report because I have reviewed the report.

Q Doctor, may I read what you said about the Golden Isles record?

A Yes.

Q All right.

"The patient was taken to surgery 12/5/73, surgery by Dr. Gervin, who assisted by Dr. Leone and a right hemi-laminectomy with neuralysis and excision of the herniated nucleus pulposis L4-5 was done. A negative exploration at the L3," it says,"3-4 level," I suppose you mean L3-4 level?

A Yes.

Q "..was done for some reason. The L4-5 disc space was explored and 8 ccs of disc material removed with no report of bulging disc."

A Yes.

Q You go on to recite the next paragraph:

"Apparently there was a small tear of the dural sleeve during the procedure, requiring a single 4-0 silk suture and Gelfoam. According to the notes the patient was complaining of a good degree of right leg pain and was discharged using a walker."

A Yes.

Q Doctor, those two paragraphs that I read are two parts of the operative diagnosis, the part in the middle with the nerve damage is not there. Isn't it a fact that the scarring, the epidural adhesion, is more important that the tear in the dural sleeve?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A I don't think the tearing of the dural sleeve is of significance.

Q I don't either, doctor, yet you recorded it. But you didn't record the epidural scarring.

THE COURT: Doesn't that mean, doctor, that you didn't think it was important in rendering your opinion?

THE WITNESS: I think the significant thing is: was that the level where the surgery was done; and that the surgery that was performed was done, and that they did excise--

THE COURT: Are you then saying that the scarring of the epidural sleeve was not important for your determination in rendering an opinion in this case?

A Yes. I feel that the removal of the disc at that level--the scarring is a usual thing that you do see with a ruptured disc. So we would assume that it would be there

in the first place when you go in for surgery.

You could report it or not report it, but the important thing is, did you remove the material at that level and how much did you remove.

THE COURT: You would say that the scarring at the epidural sleeve at that level would not change the opinion you rendered in this case? The fact that there was scarring there?

THE WITNESS: It's something I would --

THE COURT: He can go to something else.

MR. LASSOFF: I think he was still answering.

A It's something you would expect with a disc.

Q I see. Doctor, isn't it a fact that when you have epidural scarring or adhesion that that makes this laminectomy more complicated?

A Yes. This is one of the things that makes a laminectomy a complicated procedure.

Q And more difficult?

A Yes.

Q And more dangerous?

A Yes.

Q So that it is significant?

A Yes, it is.

THE COURT: The only important thing to this jury

is whether its existence would change the doctor's opinion as to what he has given here.

MR. LASSOFF: Yes, your Honor, I understand.

Q Now, doctor, as a physician examining it is important to you to get as good a medical history as possible, is it not?

A Yes.

Q You want to know everything that has happened to the man since he had the injury and you want to know what kind of treatment he had, what kind of medication he was taking, what instruments or machines he was using, if any, correct?

A Those significant treatments that he has had and those significant operative procedures that he's had and trials of treatment that he has had, these are significant. But every--each and every medication, each and every detail of various modalities of physiotherapy I don't think are that significant.

Q Doctor, incidentally, this laminectomy, is that customarily performed by a neurosurgeon with orthopedist assisting?

A Either way. I have seen it done by orthopedists alone, neurosurgeons alone and orthopedists with a neurosurgeon assisting or vice versa. There are four different ways

to do it.

Q Doctor, have you ever heard of a transcutaneous nerve stimulator?

A Yes.

Q What is that, doctor?

MR. SCHULTZ: If your Honor please, may I respectfully object again, your Honor, and urge the judge--

THE COURT: I respectfully rule the same way. It's perfectly obvious that he can test this man's knowledge.

Go ahead.

A A transcutaneous nerve stimulator is a machine that you usually use to select cases that would be candidates for a dorsal column root stimulator. And what it is, actually, it's a machine that applies an electric stimulation to the skin or transcutaneously to the deeper tissues. In the area that the patient is complaining of. In other words, if you have an L4-5 disc and you have pain over the distribution of of the L4-5 dermatome, you apply a transcutaneous stimulation to this area. This is based on a theory, a gate theory they call it, if you want to call it; telephone cables of the spinal column can only carry so many messages at a time. So, if you jam the station with too many signals coming in, that you can knock out the pain signals coming in and decrease the amount of pain.

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So you try to use the transcutaneous stimulator to see if this patient is going to be a candidate for--maybe this alone can knock out the pain or it would indicate that he would be a candidate for an operative procedure where you put in a dorsal column stimulator.

Q Doctor, don't you put a dorsal column stimulator in the upper spine, not for a L4-5?

A Yes, you put it up on the long columns. As I say, it blocks the pain pathways to the brain by jamming the brain pathways to the brain. The patients with organic overlay, though, will get--won't get relief from a cutaneous stimulator. It's irritating to them.

Q Doctor, at the time you examined this patient, were you aware that prior to the Rhizotomies, that you have reported in your report, that he had used a transcutaneous stimulator?

A I believe this was mentioned by what's his name, Dr.--it begins with a G.

Q Gervin?

A Yes.

Q Incidentally, did you know Dr. Gervin down in Florida?

A No, I don't.

Q Nowhere in your report is there any mention of a

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transcutaneous stimulator, is there, doctor?

A No. I did not go through and quote Dr. Gervin's consultation or his reports. I just referred to them.

Q Isn't this a significant instrument that was used in an attempt to alleviate pain?

A I would have to review Dr. Gervin's report again, which you have taken back from me. Let me see what it referred to.

Q Doctor, do you mean to tell me that you wrote a report and that you came up here to New York and you have testified and you can't tell me now whether this is a significant device that was used to relieve pain?

A I was referring to this case.

Q That's the only case we're referring to, doctor.

Q I thought I had seen it. Maybe I didn't.

Q But you knew about it, anyway?

A I don't know that I do now.

Q You don't know that you do now?

A That's correct.

Q You don't know--didn't you speak to Mr. Chiarello about his treatment besides what the doctors put down?

A Yes, but I don't recall this. Is it in my report? Without me going through it--

Q I already said there was not a word about it in

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your report.

A Is it in these records or should I go through the records for you? To see if it is in there. I don't recall.

Q I don't know if it is there or not. All I wanted to know is did you know about it?

A If it is not in these reports, I don't know about it.

Q But there are other things that are not in these reports that you did know about, such as epidural adhesions.

A Maybe you misunderstood me. I was talking of the reports of the hospital and the reports of Dr. Gervin and the reports of Dr. Rennie.

THE COURT: All he's saying to you if it is in the documents that you claim you had the plaintiff bring to the witness, then he read it.

THE WITNESS: That's right.

THE COURT: And if it is not in there, he didn't read it.

Q May I see the documents? I can probably find it fairly quickly.

A Yes.

Q Doctor, what's a Rhizotomy?

A A what?

Q A Rhizotomy.

A A Rhizotomy, you mean in this specific instance or generalized Rhizotomy or what? A Rhizotomy is an interruption of the fibers carrying pain--carrying pain.

Q I believe you were furnished with a hospital record that this operative or surgical procedure had been done with regard to Mr. Chiarello?

A The subcutaneous Rhizotomy, facet Rhizotomy.

Q Facet or Lushka Rhizotomy, whatever you want to call it.

A Yes, sir.

Q Why is a Rhizotomy done?

MR. SCHULTZ: If your Honor please, may I respectfully present an objection at this time, your Honor? This certainly has been enough testing of this man's knowledge and credibility.

THE COURT: You may think so but I overruled you. You would rather have the plaintiff not ask any questions, that's obvious. And the plaintiff doesn't want you to ask any questions of his doctor. He has full range of going into the background of this case insofar as it bears on the witness's credibility as an expert.

A Why would a Rhizotomy be done, facet Rhizotomy? What it is based on, this is a theory, it's not a proven thing, and it originally started with a doctor who had the theory

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that when you have a ruptured disc you lose some of the material of the disc; therefore, you get a settling of the two bones on each other, which changes the articulation of--or the joint in the back of the spine, and it's the change in the joint that is causing the pain.

And so this original doctor felt that he could inject a solution into the area of these joints with the loose capsules and sclerose or scar the joint capsules to tighten up those loose capsules that he theorized was causing the pain. So they had a number of cases in the early '50's where they injected this sclerosing solution and like most new procedures they hit a curve of popularity, and when they get more widely tested it falls out of popularity. There were, however--this eventually fell into disuse.

There were, however, some cases where they did get good results. So then a further theory was propounded upon this by an Austrian doctor who felt that the reason that people were getting good results was because it was knocking out the nerve, recurrent nerve that was coming off of the dorsal root, to the articular facets, and it was the knocking out of this nerve that was giving the good results.

So therefore he devised a procedure where he did a subcutaneous Rhizotomy of the facets, where he did a small stab wound and actually reached in with a pointed scalpel

and cut these nerves. He came--the doctor over here heard of this and brought this doctor, Austrian doctor over here. And they did several of them and so he was enthused about the procedure.

But there's a lot of bleeding with the operative procedure where you use a knife. Therefore, the next doctor used what he calls radio frequency waves, which is like a diathermy wave, where there's no actual cutting or surgery, where a needle is introduced into the area of the nerve to knock out the nerve to the articular facets, and this is a procedure called a subcutaneous facet Rhizotomy. It's a procedure which originally was just started in 1971, and the final note has not been brought in.

The reason it's done again is to knock out pain in the back which doesn't clear up after an operation.

Q I see. So that certainly the fact that a Rhizotomy was performed would be a very definite clue to you as an orthopedic surgeon that this man had been suffering substantial pain?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled. There's a question mark at the end of the statement, doctor.

THE WITNESS: Yes.

Yes, I understand that.

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A I would certainly assume that the doctor that performed the procedure felt that there was a degree of pain that would warrant doing that procedure, yes, sir.

Q What is the degree of pain that would warrant that procedure, doctor?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

Q Doctor, have you ever heard of the term intractable pain?

A Yes, sir.

Q What is intractable pain?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A Intractable pain is pain which is not relieved by anything.

Q It would be that kind of pain that would warrant a Rhizotomy?

MR. SCHULTZ: Objection, your Honor, please.

A Yes.

THE COURT: Overruled.

A In the Rhizotomy now there are some contraindications and those would include neuroses, severe neuroses, addiction to drugs or nonorganic type of pain. You're not going to clear up nonorganic type of pain. This is why you use a

transcutaneous stimulator to see if that pain is real pain or whether it is nonorganic in its origin.

Q Doctor, you have read the record of the hospital and did not the record reflect that after this Rhizotomy the pain had gone to Mr. Chiarello's legs but his back was still painful?

A After what?

Q After the Rhizotomy.

A The Rhizotomy?

Q I will give you back the records.

A Even on those reports they're inadequate. On those reports it said he had immediate relief of the leg pain and was discharged from the hospital; which gives us like a two-day follow up.

Q Right. Now, doctor, this electric destruction of a nerve, that's not the same as a surgical cut of the nerve, it is?

A That's right. It's by temperature, heat.

Q When you have an electric destruction of a nerve, I believe quite often that nerve regenerates?

A And surgical, also. Where they do a surgical procedure Rhizotomy on the spinal column, very frequently these regenerate.

Q And when they regenerate, they cause pain again,

do they not?

A Correct.

Q Doctor, following the Rhizotomy, Mr. Chiarello has testified that he continued to be in pain, the pain becoming worse, and that he had another myelogram, I believe on July 28, 1975, by Dr. Gervin, and I believe that you today in this courtroom examined the x-rays of the myelogram; is that correct?

A Yes. I looked at it briefly. I didn't really examine them. I'd be happy to if you want me to.

Q Doctor, you know how to read a myelogram, don't you?

A Yes, sir.

Q What do or what does those few x-rays in that myelogram study show?

MR. SCHULTZ: If your Honor, please, may I respectfully object?

THE COURT: Sustained.

MR. LASSOFF: Are the x-rays available?

Q Doctor, did you go over all of these x-rays with Mr. Schultz prior to taking the stand today?

A All of which x-rays, sir?

Q The ones in my hand.

A In the folder, also?

Q I'm asking you, I don't know what you looked at--

THE COURT: He doesn't know what you're asking.

A That's what I wanted to know, what you're asking about.

Q If you looked at all of them, yes, if you only looked at three on top, just the three on top.

A I didn't look at all of these. I just saw two or three of them. I looked at three of those.

Q All right.

A I'm not sure which.

Q Doctor, you looked at those three x-rays. You are trained to read those x-rays; is that correct?

A That's correct.

Q Can you tell me what those x-rays revealed to you?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

MR. LASSOFF: On what grounds, your Honor? They're in evidence.

THE COURT: No, you had a doctor here. You had two experts on the stand. He's not here to prove your x-rays.

MR. LASSOFF: I understand, your Honor.

THE COURT: I don't even know what you're showing him. The record doesn't know what you are showing him.

Objection sustained. I will not allow you to ask

the doctor even if you cure the clarification for the record, what those x-rays show.

Q Doctor, I want you to assume that an orthopedic surgeon by the name of Dr. Arthur Friedman examines Mr. Chiarello and those myelograms or January 5, 1976, and that a neurologist, Dr. Lawrence Kaplan, examined Mr. Chiarello and the myelogram on January 6th of 1976, and that both of them find that the myelograms reveal a defect at L4, L5 either in the nature of a recurrent herniated disc or scar tissue. Can you tell me how that fits in with your diagnosis as of your examination of February 5th?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

Q Doctor, when you reviewed those x-rays today, did you make any notes?

A No.

Q Based upon your examination of those x-rays today, doctor--

A I really--

Q What if any procedure--

THE COURT: He said before he didn't examine them. He looked at them. He was very careful to draw a distinction between examination and looking at them.

A That's right.

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Q Well, did you look at them with a shadow box or without a shadow box?

A I just glanced at them like that.

Q They weren't important to you?

THE COURT: Oh, come on.

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Strike that.

MR. SCHULTZ: If your Honor please, these myelograms were taken subsequent to his examination.

THE COURT: I have already sustained your objection.

MR. SCHULTZ: If your Honor please, I'm objecting to the question and the impact of it.

THE COURT: I have already stricken the question.

MR. SCHULTZ: Mr. Lassoff knows it was subsequent to his examination.

THE COURT: You're purposely prolonging this now, Mr. Schultz. Cut it out.

Q Doctor, I have read your report and I see no mention in your report of pain that you found the patient to to be suffering with. Did you find him to be suffering with any pain? Not complaint now.

MR. SCHULTZ: If your Honor please, I don't know what the difference is between a complaint and suffering.

Q Did you find medically a cause for him to be in

pain is what I'm asking you, doctor?

A Yes, I think he's having some pain.

Q Where?

A In the back primarily.

Q Why?

A From the surgery probably.

Q What part of the surgery problem?

A To the laminectomy.

Q How about the epidural adhesion and scarring?

A And the scarring secondary to the laminectomy, yes, more than the scarring that was before the laminectomy.

Q How does that cause pain?

MR. SCHULTZ: Objection, if your Honor please. Again he's using this man for his witness, your Honor.

THE COURT: Overruled.

A It binds down those roots at that level so that there's less elasticity at that level.

Q When you have pain emanating from a nerve root at L4, L5, what type of pain is that, doctor?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

Q Is the pain that you have with scarring and epidural adhesions at L4, L5, severe pain?

MR. SCHULTZ: Objection, if your Honor please.

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THE COURT: Sustained.

Q Doctor, what does ten percent disability as a whole mean?

A What this means is after I have reviewed all of your recrods, which I have not written all of the records down of what I reviewed, and have gone over the patient's history with the patient, and have done a physical examination on the patient and reviewed x-rays that I obtained, that I took of the patient, that in my opinion I feel that his functions is impaired by ten percent.

Q What function?

A In other words, I think--

MR. SCHULTZ: If your Honor please, could the witness please be permitted to finish?

THE COURT: He's finishing.

Q What function, doctor?

A Sir?

THE COURT: Finish your answer and withdraw your question.

MR. LASSOFF: I withdraw the question.

A He is ten percent impaired in his function. In other words, in all of his functions. This doesn't, as I said one time I mentioned up here on the stand today that I'm not an occupational expert, so I don't take that into

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account the patient--this ten percent may knock him out of one occupation but nothing at all insofar as another occupation is concerned. I'm talking about all functions, as far as walking, standing, bending, twisting, sitting, lifting, twisting, pulling, all of those functions that require the strength and structure of the back itself. These are the functions that I feel are involved. I don't feel there's any--I'm not trying to evaluate any other impairment of any functions other than to the muscular skeletal system or the muscles in the joints of the body.

Q To give me some idea of what the ten percent of the body means in relation to other things, what would the loss of a leg be in your terms of evaluation?

A Fifty percent.

Q Fifty percent of the entire body?

A That's correct.

Q Two legs?

MR. SCHULTZ: If your Honor please, may we have an objection to that?

THE COURT: Overruled.

A This would be a hundred percent disability.

Q A hundred percent of the entire body?

A Yes.

Q Industrial?

A That's my understanding, yes.

Q Doctor, if I understood your testimony, you said that my client could not do any work requiring any repeated bending or repeated lifting nor any lifting over thirty pounds, he also should do no work requiring a bent over position for any prolonged period of time, that he couldn't sit for more than five or ten minutes at a time.

THE COURT: No, he didn't say that. He said thirty minutes.

MR. LASSOFF: He said he needed a break every thirty minutes.

THE COURT: He didn't say every five minutes.

Q Did you say five or ten minutes?

A I said every thirty minutes or an hour he should have a five-minute break.

Q I see.

A Of prolonged sitting or standing. The other way around.

Q Can you tell me what the occupation he can work at with those recommendations?

MR. SCHULTZ: Objection, your Honor.

THE COURT: The witness has already said he's not versed in those fields. He's merely telling you what the man is able to do.

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Q Doctor, when you examined this man, did you know that he was a pier superintendent, a terminal s.perintendant?

A I don't know what that is.

Q Well, that means--

THE COURT: What difference does it make, Mr. Lassoff? He's not talking about going back to the work he was doing.

Q Could this man do manual labor, doctor?

A If by manual labor it includes these activities that I feel he's excluded from, the answer is no.

Q Doctor, when you had those x-rays in the shadow box, it looked to me as if you had a straightening of the lordotic curve in both the cervical spine and lumbar spine.

THE COURT: Is that a question?

Q Is that a fact?

A Not to me.

Q Not to you.

A Yes.

Q I believe you said, doctor, that this man has reached maximum medical improvement and needs no further medical treatment; is that correct?

A. Yes. I felt at the time I saw him, which was the 5th of February of '75, that any further treatment or time would not give him much benefit to the good or to the bad.

Q So that you would not recommend a reexploration

at disc level or a spinal fusion; is that correct, doctor?

A That's correct.

Q Because you don't think that they will help this man?

A No.

MR. LASSOFF: Thank you very much.

THE COURT: Redirect.

MR. SCHULTZ: No questions, Judge.

THE COURT: You may step down. Thank you, doctor.

THE WITNESS: Thank you , Judge.

THE COURT: Have a good trip back to Florida, away from the cold of New York.

(Witness excused.)

THE COURT: Next witness.

MR. SCHULTZ: Dr. Gould, please.

E D W A R D M. G O U L D, called as a witness, being first duly sworn, testified as follows:

THE COURT: You may proceed.

MR. SCHULTZ: Yes, sir.

DIRECT EXAMINATION

BY MR. SCHULTZ:

Q Dr. Gould, how old are you, sir?

A 74.

Q Doctor, are you a doctor licensed to practice

medicine in the state of New York?

A I am.

Q Doctor, would you please be good enough to give us your educational background, please?

A I'm a graduate of the Yale School of Medicine, 1924, licensed in New York in 1925, spent two years at the New York Neurological Institute, which is part of the Columbia Presbyterian Medical Center in the study of neurology. I entered the practice of that specialty in 1927. In 1928 I became attending neurologist of St. John's in Queens. In 1935 I was one of the founders and directors of neuropsychiatry at the Queens General. I'm still a consultant there. I'm also a consultant at several other hospitals. I'm a diplomate of the Board of Neurology and psychiatry, state qualified psychiatrist.

I'm still practicing my specialty.

Q Now, doctor, at my request did you examine Mr. Chiarello--I believe this past Monday?

A That's correct.

Q Doctor, did I ask you to conduct a neurological examination of Mr. Chiarello?

A Yes, sir.

Q Sir, where did you conduct this examination?

A In my office in New York city.

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Q Who accompanied Mr. Chiarello with you?

A His wife.

Q Now, doctor, did you obtain a history from Mr. Chiarello?

A Yes, sir.

Q Thereafter, did you conduct an examination of Mr. Chiarello?

A I did.

Q Would you be good enough to tell this Court and jury what examination you conducted and each and every step? Would you do that, please?

A The examination consisted, first of all, of a review of his complaints, and he explained the various symptoms that he had and I went from top to bottom and then I did a physical and neurological examination?

Q Would you tell us at this time what complaints he made to you on Monday?

A He stated that he had right occipital headache, that is, headache and pain in the back, about one to two times a week, sometimes lasting for an entire day. There was no improvement. He takes various medications for relief.

There was no dizziness, vision and hearing were in tact. His sleep was poor, he states he still is depressed. He reports neck pain to the right shoulder down to the right

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upper extremity, to the second to the five fingers, and to the knuckles.

The right grip is weak. He reports pain in the low back with radiation to both lower extremities, more so on the right down to the right toes.

There is also numbness of the right leg and toes.

Q Doctor, those--

A Weakness of bringing up his foot and his toes and his bowel movement was painful.

Q Doctor, those were the complaints that he made to you, is that correct?

A That's correct.

Q At that time?

A Yes, sir.

Q Doctor, after hearing his complaints did you conduct a physical examination?

A I did.

Q Now, will you tell us what you did and each and every one of your findings, if you will?

A The head, the cranium, was negative, but he had tenderness to palpation in the right occipital scalp. The pupils were equal. The eye movements were normal, vision and hearing were in tact.

Examination of the neck revealed no significant tenderness,

movement was free. There was no spasm. He complained of right shoulder and arm pain but there was no physical findings to confirm this. There was no atrophy. The movements were good, the hand movements were all good, his grip was a bit weak, but in the right arm, forearm and hand, he had an area of numbness extending down for just below the shoulder area on the outside of the arm, on the outside of the forearm, on the back of the entire hand up to the exception of the thumb.

He claimed he could not detect sharpness of the pin prick. When the hand was turned over, he could detect pin prick in the entire hand. This was not an anatomical finding. Not in keeping with the anatomy of the right upper extremity.

Q In other words, doctor, by that would you tell the Court exactly--and the jury--exactly what you mean by that, that it is not in accordance with an anatomical finding.

A Well, you see, the arm is supplied by three main nerves. Each one of these nerves has a separate sensory distribution. The distribution which he claimed did not correspond with any of those distributions. They're entirely abnormal. That is not fitting and not an anatomical defect.

Q In other words, doctor, there would be no organic reason that you could discover why he should not feel sensation; is that true?

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A There was no organic base for his complaints as to the pin stimulation.

Q What else, doctor, did you find?

A He complained of low back pain and he had--he could bend over fairly comfortably. He couldn't straighten up too well or turn from side to side. He had a sensory defect in the right lower extremity, also, beginning at the hip, going up to the--part way up the flank, down the outer aspect of the right leg, right thigh, right leg and right foot.

Again, this did not correspond to any anatomical pattern and could not be explained as any organic neurological defect.

Q In other words, doctor, with relation to his claimed loss of sensation there was no organic reason why he should claim that; is that correct?

A That's correct. Nothing to account for it in the examination.

The raising up his foot and toes was fairly good although he said he got weak and tired easily. The tendon reflexes were essentially equal on the two sides, somewhat sluggish, but no abnormal reflexes.

Q What does that mean to you, doctor, when they're equal and they're not abnormal?

A In other words, if the reflexes are essentially

equal on the two sides, in the knees and the ankles, then we can ignore that as an abnormal finding.

Q Does this mean to you, sir--incidentally, your field is that of neurology; is that correct?

A What's that, sir?

Q Your field is the study of neurology; is that correct.

A That's right.

Q And this involves the nerves; isn't that true?

A That's correct.

Q When you find in your findings that the reflexes and neurological tests were equalled, did this indicate to you that there was no nerve involvement?

A There was no evidence of any nerve involvement, no evidence to indicate that there was pathology.

Q Go ahead. Continue, sir.

A He had some discomfort on movement of the legs, complained that it caused hip pain. His gait was accompanied by the use of a cane, and he walked with a marked limp.

Q Now, doctor, with relation to this cane, did you find any organic pathology or reason for him to use a cane?

A No, sir.

Q Now, he claimed that there was a weakness in his right hand; is that correct?

A Yes, sir.

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Q What did you notice or what do you attribute or what is there about the use of the cane in this right hand, would you tell this Court and jury?

A Well, he supports his weight on the cane and he has a good grip on it, so that the actual grip can't be very weak.

Q Doctor, what else did you examine and test, Dr. Gould?

A That was essentially the history and the physical and neurological examination.

Q Now, doctor, when you completed this examination, did you reach any opinion as to your findings? What opinion do you have?

A Well, the man has a definite history of low back injury and surgery. There was also a claim of a neck injury but nothing there to find it--to explain his claim. And I felt he still had a nervous overlay of the entire condition and I couldn't explain it on any organic neurological base.

Q Doctor, in your opinion, is this man capable of doing any work?

A Theoretically he should be able to do some work, certainly nothing strenuous at the present time. But he could hold down a desk job, certainly.

Q Doctor, I met you today for the first time and

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we went to lunch; is that correct?

A That's correct.

Q And we discussed your examination and your findings; is that correct?

A It is.

Q Have you ever been to Court to testify for any of my clients at my request at any prior occasion?

A Not as far back as I remember.

MR. LASSOFF: Your Honor, is this testimony necessary?

THE COURT: Certainly. Who knows, you may ask the questions on cross. He is entitled to anticipate it.

MR. LASSOFF: All right.

Q Doctor, did you ever testify at my request for any client that I represented before?

A No, sir.

MR. SCHULTZ: You may examine, sir.

MR. LASSOFF: Thank you.

CROSS EXAMINATION

BY MR. LASSOFF:

Q Doctor, may I see your records, please?

A Certainly.

Q Did you ever type them up, incidentally? Do you have more than one copy of this report?

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MR. SCHULTZ: He gave me a copy of the report at lunch time.

MR. LASSOFF: Can I have a copy? If I take his, then he can testify.

THE COURT: Do you have another copy of this report?

MR. SCHULTZ: Yes, sir, I do.

THE COURT: Produce it. Don't keep both of them, Mr. Lassoff. Give the doctor his copy.

MR. LASSOFF: I'm going to look at them.

THE COURT: They're both the same, aren't they?

MR. LASSOFF: No, one has many more pages, your Honor.

Q Doctor, I believe you called me last Thursday to arrange this physical examination of Mr. Chiarello; is that correct?

A That's correct.

Q And you wanted me to send them out to your house in Woodmere on Saturday; is that correct?

A Will you face me when you talk? I've got a bum ear.

Q I forgot. I'm sorry. You wanted me to send them to your house in Woodmere on Saturday?

A That's correct.

Q But I told you I had use for them on Saturday so we

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made it Monday?

A Yes.

Q When Mr. Chiarello came to your office he brought with him certain records that I gave him to give to you to examine; is that correct?

A That's correct. You were most helpful.

Q Prior to examining Mr. Chiarello, did you read those records?

A I did.

Q Incidentally, at the time that you made this appointment with me to examine Mr. Chiarello, did I tell you that Mr. Chiarello has just been examined by Dr. Lawrence Kaplan on Tuesday of the week you called me?

A That's correct.

Q Incidentally, do you know Dr. Lawrence Kaplan?

A I do.

Q He's a neurologist; is that correct?

A He is.

Q What is his standing in New York amongst neurosurgeons?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Sustained.

Q Doctor, did you tell me that if I had Dr. Kaplan's

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report it would make your work much simpler?

A What's that?

Q Did you tell me that if I could send you Dr. Kaplan's report it would make your work much simpler?

A That's correct.

Q Did I tell you that I wouldn't have Dr. Kaplan's report until later on?

A You're quite right.

Q Doctor, when I sent records up to you, I sent, I believe, the complete neurosurgical record of Dr. Stephen Gervin, did I not?

A What's that?

Q I sent you the complete neurosurgical record and reports of Dr. Gervin.

MR. SCHULTZ: Objection, your Honor. How would this man know that they were complete?

THE COURT: That's true.

Q I sent you a pile of papers from Dr. Gervin, correct?

A That's correct.

Q And did I send you at that time a report of a myelogram that had been taken by Dr. Gervin on July 28, 1975?

A Yes, sir.

Q So at the time you examined Mr. Chiarello you were aware that a myelogram had revealed a defect at the L4, L5

level; is that correct?

A Yes, sir.

Q What defect did you find on clinical examination?

A On clinical examination you don't see any defect in the myelogram.

Q Well, a disc or scar tissue does produce symptoms, doesn't it?

Q What's that?

Q A disc or scar tissue does produce symptoms?

A It can.

Q Did you find any symptoms when you examined Mr. Chiarello?

A Well, he complained of back pain.

Q What could you, as a doctor, see on your examination?

THE COURT: Obviously nothing.

THE WITNESS: There was nothing I could see.

THE COURT: Except the tests that he had administered.

A He had his complaints.

Q Did you--

THE COURT: This doctor is an neurologist, not an orthopedic surgeon.

MR. LASSOFF: I agree, your Honor.

Q Did you trace the nerve emanations from L4, L5 down the back through the spinal column into the legs?

A I did.

Q What did you find?

A The sensory testing--first of all, the reflexes were both sluggish and equal. The sensory testing could not be done accurately because of this abnormal marked loss of sensations that he had of nonanatomical nature.

Q Doctor, do you read myelograms? Do you read myelograms?

A Not with experience.

Q Isn't part of a neurologist's work the diagnosing of injuries such as herniated discs?

A It is, in the clinical sense, but I defer to the x-ray men for the final opinion in a myelogram.

Q Well, do you examine them yourself to determine whether you think they're right?

A Sometimes, but they have infinitely more experience than I do and I'm happy to defer to them.

Q So I take it that if I told you that Larry Kaplan reported that the myelogram--

THE COURT: I don't know who Larry Kaplan is and I don't care what interesting tidbit you can give that Mr. Kaplan told you.

MR. LASSOFF: I'm not saying that, your Honor.

THE COURT: Come on. Let's not have that in cross

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examining the witness.

Q Doctor, what disability did you find Mr. Chiarello to have at the time you examined him?

A What's that again?

Q What disability did you find Mr. Chiarello to have at the time you examined him?

A Well, he had a disability in that he claimed back-ache, difficulty in walking, and a limp on the right. Also complained of headache but that in itself is not particularly disabling.

Q Doctor, at the time you examined Mr. Chiarello, I don't mean to yell at you, but I know you're sort of hard of hearing, you knew that he had undergone a laminectomy?

A I don't get you clearly, sir.

THE COURT: Maybe you're talking too loudly, Mr. Lassoff.

A No, he's loud enough but not quite clear.

Q I see. When you examined Mr. Chiarello, doctor, you knew that he had undergone surgery and had a laminectomy performed?

A That's correct.

Q And at L4, L5?

A Right.

Q And you know or you knew that he had, following

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surgery, been using a machine called the transcutaneous nerve stimulator?

A That's correct.

Q And you knew that he had undergone another operative procedure called facet Rhizotomy?

MR. SCHULTZ: I respectfully object, your Honor, this is not the question. This is you knew, you knew, you knew. I respectfully object.

THE COURT: I'm reading a question mark in and I think the good doctor reads a question mark in. Objection overruled.

A Yes, I knew that.

Q Doctor, the word keeps escaping me--this machine that I just discussed, what's the purpose of that machine?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Sustained. We've been through this now umpteen times.

Q Doctor, the machine and the Rhizotomy, are those radical medical procedures for eliminating pain?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

MR. SCHUTLZ: The doctor I don't think heard.

THE COURT: This machine that was used.

MR. LASSOFF: Transcutaneous nerve stimulator.

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A It's not a radical machine, it's used for relief of pain, which it did in this instance.

Q Which it did in this instance?

A According to Dr. Gervin.

Q For how long?

A That I don't know. He said the patient said he used it, I don't know exactly how long, but he had to give it up because he developed burns.

Q And the Rhizotomy, doctor, is that a radical medical procedure for the use of pain?

A It's a complicated procedure. It's not particularly radical but it's a detailed procedure.

Q Is it something that is only used by physicians, orthopedic surgeons and neurosurgeons for intractable pain?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Sustained. Reframe your question.

Q This operative procedure, this facet Rhizotomy--

A Yes, sir.

Q (Continuing) --what type of pain would a patient have to have to warrant that operative procedure?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

A He has to have complaints of pain which can't be controlled by ordinary medication.

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Q When complaints of pain can't be controlled by ordinary medication, is there a term medically for that type of pain?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

A I don't know if it has a particular term. It may be classified as a root pain, but here it wasn't a question so much of root, as just general low back pain.

Q Doctor, have you ever heard the word intractable pain?

A Yes.

Q What does that mean?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A Intractable pain is pain that is caused, which we usually see say in a malignancy where nothing can be done to relieve that pain.

Q Doctor, when you examined these records, did you examine the operative report at the Golden Isles Hospital where the laminectomy was performed?

A That copy was completely blurred, but I assumed if he had had a laminectomy, they did a hemi-laminectomy.

Q Did you know what the operative diagnosis was?

A I think it was a herniated disc L4, L5, S1.

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MR. LASSOFF: I think this is Plaintiff's 6, your Honor.

Q Can you read that, doctor?

A Epidural adhesions.

Q The operative report in addition to the preoperative report listed secondary finding of epidural adhesions. What does that mean?

MR. SCHULTZ: If your Honor please, may I respectfully object? This is not--

THE COURT: This doctor has said that the copy of this report that was furnished to him he couldn't read.

MR. LASSOFF: I want to know now if he can see if it has any significance to him, your Honor.

THE COURT: Too late for that.

MR. SCHULTZ: Objection, your Honor.

THE COURT: Objection sustained.

Q When you were asked to make this report, were you furnished any material at all by Mr. Schultz or his office?

A What's that, sir?

Q When you were asked to examine my client, Mr. Chiarell were you furnished with any material, any medical records, any hospital records, any reports at all by Mr. Schultz or any attorneys in his office or anyone on behalf of the defendant in this case?

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A No, sir.

Q Thank you.

MR. SCHULTZ: No further questions.

THE COURT: You may step down.

THE WITNESS: It's a pleasure.

(Witness excused.)

THE COURT: It's a pleasure to step down or a pleasure to be here?

THE WITNESS: I'm a little stiff.

MR. SCHULTZ: If your Honor please, may we have about a five minute recess? I may have another witness, I don't know.

THE COURT: All right.

(Recess.)

(In the robing room.)

MR. SCHULTZ: If your Honor please, on the plaintiff's direct testimony the plaintiff testified in substance, in certain aspects, that as a result of the impact the seat of his car was broken and that it layed down flat and he described some of the gear mechanism, the teeth having been--

THE COURT: We struck that on your request.

MR. SCHULTZ: I know, but he started to do so.

Since this case did not involve a claim for property

damage I was not concerned with producing witnesses as to the items of damage. However, I knew that there was an inspection of his vehicle by an appraising company for a collision loss claim. And yesterday I located that appraiser. And in that appraisal they list--

THE COURT: You didn't locate the appraiser, you located the appraisal?

MR. SCHULTZ: Right. The report of it yesterday, late yesterday afternoon, to be truthful about it. when I left the courthouse here. And I was able to ascertain from that appraisal report that there was no damage to the seat. I also located the check that was paid to Mr. Chiarello for his property damage and at this point I attempted, last night, to call the appraisal company and I got no answer. So this morning at about twenty minutes to nine I got an answer at this place which is located at Utopia Parkway in Queens, Jamaica. I got a Mr. Stampler, who runs this appraisal company, and he tells me the appraisal was done by a Mr. Teeni, the actual inspection of the vehicle, and that Mr. Teeni was in the field going from place to place looking at cars. And that he would try to reach him.

I have a note here, 2:15 he called and said that he couldn't reach Mr. Teeni, this Mr. Stampler called and said he couldn't reach Mr. Teeni because he was out in the field,

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but that if I want him, I have to call him for tomorrow, I have to reach him by 4:30 today to let him know he should be here and that's what I want to do, I want to produce Mr. Teeni to testify as to the condition of this car and the claim of the plaintiff; and it was certainly something, your Honor, that no one could foresee at the making of the pretrial order because there was no indication in Mr. Chiarello's testimony that the seat had been broken.

MR. LASSOFF: If your Honor please, may I say, that is not true. It's in the deposition, it's in their doctor's report the seat was broken.

THE COURT: Let me see it.

MR. SCHULTZ: If there was, I missed it. In any event, I can't get this man until tomorrow morning.

MR. LASSOFF: If your Honor please, here's the police report and it shows the front seat broken in the police report. Here's the property damage. This man was insured by the same insurance company, the Insurance Company of North America. They paid the bill.

THE COURT: That isn't his point.

MR. LASSOFF: The point is they didn't know about it. But the damage to the front seat, the claim, is in the police blotter report at the time of the accident.

THE COURT: What has that got to do with it?

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MR. LASSOFF: He's saying they didn't know anything about the front seat being broken until today or yesterday or Tuesday and it's in the police blotter report at the time of the accident right here, Mr. Schlutz.

MR. SCHULTZ: Number one, I don't have this.

MR. LASSOFF: It's your responsibility to get your records, not mine, I don't think.

THE COURT: I will let the police blotter report in if you put the witness on the stand.

MR. SCHULTZ: How would you do that?

THE COURT: Because I would.

MR. SCHULTZ: There's no basis for this, Judge.

THE COURT: Kept in the regular course of business, isn't it.

MR. SCHULTZ: No, sir, not unless the cop saw it broken. If somebody tells him there's no indication that the cop was a witness.

THE COURT: Which cop is that?

MR. LASSOFFF: Port Authority.

THE COURT: The guys who pushed him off? If you won't let me put the report on, then I will have to give him an opportunity to get the cop. I think the best thing to do is to deny your application.

MR. SCHULTZ: Off the record, sir?

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(Discussion off the record.)

THE COURT: It is now 10 minutes to 4. I am ready to charge the jury the first thing in the morning. You made a request for permission to produce the person who made an appraisal for your insurance company on paying the collision insurance. The fact a claim could have been made that the seat was broken appears in the police blotter report.

It seems to me that if you wish to bring in the appraiser to testify that he did not fine the seat broken, I then would have to give the plaintiff an opportunity to bring in the policeman who made out this report. That means the case could not possibly get to the jury tomorrow chasing around trying to find the cop.

I think the application is made too late. Tomorrow is Friday. This case was supposed to be a two- or three-day case. Tomorrow is the fourth day. I go into Part I on Monday. No. Application is denied. You now have your record.

MR. SCHULTZ: Thank you.

THE COURT: You are finished?

MR. SCHULTZ: I rest, sir, and renew my motions.

THE COURT: Are you going to have any rebuttal?

MR. SCHULTZ: Sir, we are not going to sum up now, are we?

THE COURT: First thing in the morning. How long

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do you want for summation?

MR. SCHULTZ: I want equal time.

MR. LASSOFF: What do you want? I depend on you a great deal.

MR. SCHULTZ: How much time do you want?

MR. LASSOFF: I want an hour. There's a lot of medical, your Honor.

THE COURT: It's all the same thing.

MR. LASSOFF: But it's pain and suffering, and that's where the money is.

THE COURT: But the medical doesn't show pain and suffering, it's a subjective complaint.

MR. LASSOFF: I have to explain and get rather emotional about those things.

THE COURT: Well, you spend the rest of the day and night reducing yourself to 45 minutes and get emotional in 45 minutes.

You will have 45 minutes.

MR. SCHULTZ: Thank you, sir.

(In open court.)

(Jury present.)

THE COURT: Any other witnesses, Mr. Schultz?

MR. SCHULTZ: No, sir.

The defendant at this time rests, your Honor.

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THE COURT: The plaintiff rests?

MR. LASSOFF: Plaintiff rests, your Honor.

THE COURT: Ladies and gentlemen of the jury, we have completed the testimony. You can go home, we will see you tomorrow morning at ten o'clock, at which time you will hear the summations of counsel and the charge to the jury. Thank you.

(Jury excused.)

MR. SCHULTZ: At this time, your Honor, the defendant Henry Girdwood and the defendant Domenico Bus Service, Inc., again renew their motion to dismiss the cause of action of the plaintiffs on the grounds that they have failed to show any actionable negligence on behalf of the defendants.

THE COURT: The motion is denied.

MR. SCHULTZ: I also now at this time again renew my motion, your Honor, as I say, I'm not sure it is necessary, but just so the record is there, to dismiss any cause of action for medical expenses in the form of physician services. There's been nothing in this case to document any expense for doctors.

MR. LASSOFF: Conceded, except for the one hospital bill, your Honor.

THE COURT: $60?

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MR. LASSOFF: It's there. Except for that.

THE COURT: I will only charge the jury that the only recovery before them for any medical expenses or hospital bill is a $60 bill.

MR. SCHULTZ: Sir, I first confined myself to doctors' bills.

THE COURT: I lumped them together. I'm going to say the only proof before them is the $60 bill for the hospital.

MR. SCHULTZ: If your Honor please, as I recall, there was a separate allegation in the complaint for physicians' services and I want to move to dismiss that on the basis that there was no proof--

THE COURT: That is not the cause of action. That's an item of damage and I am telling you I will not submit that item of damage to the jury.

MR. SCHULTZ: All right, your Honor.

THE COURT: Because there's no proof in the record to justify the submission of that item.

MR. SCHULTZ: Again, I renew my motion to strike the opinion testimony of both Dr. Friedman and Dr. Kaplan.

THE COURT: Denied.

MR. LASSOFF: May I make a motion for the record,

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your Honor? Plaintiff moves for a directed verdict that on the basis of the testimony of defendant's driver alone there was no foreseeable way that he could avoid this accident. Proceeding at the speed he was proceeding, without breaking the law of the state of New Jersey, in following too closely.

THE COURT: That's a question of fact for the jury. Denied.

See you tomorrow, ten o'clock.

(An adjournment was taken to January 16, 1976, at 10 a.m.)

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THOMAS J. CHIARELLO and
ANGELA CHIARELLO

vs.

73 Civ 2962
73 Civ 1956

DOMENICO BUS SERVICE, INC.,
and HENRY GIRDWOOD

January 16, 1976
10 a.m.

(Trial resumed. In the robing room.)

THE COURT: I have requests to charge from Mr. Lassoff. The request is denied because it is embraced with the normal charge on negligence.

I have a request to charge from Mr. Schultz.

Number one is denied except as charged.

Number two is denied except as charged.

Number three is denied except as charged and I don't use the words "substantial factor" in bringing about the injury. That is not required by the law.

Number four is denied.

Number five is denied because the facts don't justify the submission of the charge.

Number six is denied except as charged.

Number seven is denied because the facts adduced by the testimony don't justify the submission of the charge.

MR. SCHULTZ: May I respectfully except, your Honor.

THE COURT: Let's go.

(In open court, jury present.)

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THE COURT: You may proceed, Mr. Schultz.

MR. SCHULTZ: Yes, your Honor.

If your Honor please, Mr. Lassoff, ladies and gentlemen of the jury:

As was told to you in the onset of this case, the lawyers were to come to you at the end of the case to review evidence with you in order that you might reach a conclusion.

The difficult task that you face now commences, because it is your duty and privilege to sift the evidence, reach a conclusion and render a verdict that will be fair to all of these parties; Mr. Girdwood, my client, the bus company, the plaintiffs in this case, and it is exceedingly difficult to do.

There were a series of witnesses in this particular case. The plaintiff, Mr. Chiarello, Dr. Spitz, Dr. Friedman, Joseph Chiarello, Angela Chiarello, Dr. Kaplan and Dr. Seplaki. These were the witnesses that were called by the plaintiff. The defendants produced Mr. Girdwood, my client, the defendant himself, Dr. Baird and Dr. Gould. The witnesses can be divided into factual witnesses and to expert witnesses. The factual witnesses are Mr. Chiarello, Mrs. Chiarello, possibly Mr. Joseph Chiarello, Mr. Girdwood.

I will review the factual testimony as I recall it and I say to you that in the event that your recollection and

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mine differs, certainly yours controls because you are the finders fo the facts.

Let us examine first, then, Mr. Chiarello, Thomas Chiarello, the plaintiff in this case. He told us that the occurrence took place on June 30, 1972, and that it took place on a roadway going to the Bayonne Bridge. He told us that there was a dip in the roadway over which a trestle ran, and he said that you went down into this dip and then the roadway started to go up, but that there was no water in this dip, which should be obvious to all was the lowest portion of the roadway.

He stated that it did not flood, and that as he was going up a slight grade there was another area where there was another puddle and he also told us that it had been raining quite heavily immediately prior to the accident.

He also told us that he had gone to work originally for American Stevedors, the stevedoring concern that had contracts for providing stevedors on the docks, and that this organization was owned by its family. That organization was then merged with another organization, Universal Terminal Loading or whatever it may be, and he continued to work for them and also did his uncle, Joseph. And I think others.

Subsequent to the accident, in August of '73, he removed to Florida where he purchased a one-family home with

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his wife and family, and I believe you recall that this home, he stated, had a pool in the back. And in essence he described that area where he lived.

What is extremely important in this case, and I wish that you would consider it, give it some thought, is he testified that he was treated here in New York in Staten Island by Drs. Urs, Spitz, Lanier, Leventhal, Rothman and some others. These were local treating doctors. Bear that in mind, if you will.

He then described the happening of the accident, that he observed the bus going into the dip, there was a car ahead of him that had stopped, he stopped, and he was struck in the rear. He told us that he got out of his vehicle, went to the back, went to the bus, was pushed across the roadway and that he saw Dr. Spitz sometime shortly after the accident. Dr. Spitz, however, is a friend of his father-in-law, Mr. Cardillo.

He then told us that he was experiencing pain in and about his neck and his back and that at some time he went to, more specifically, in January of 1973, Richmond, Virginia, to a hospital at which he had a relative who was a treating doctor at that hospital. I forget the name of that relative. And he went in there and a myelogram was performed and the reports of themyelogram indicate that there was a defect at

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L4 and L5.

Then returned back to New York, came under the care of these doctors, Lanier, others, and in December of 1973 he went to the Golden Isles Memorial Hospital in Florida, where a laminectomy was performed. It was performed by a Dr. Gervin, apparently, and he was under the care of a doctor by the name of Dr. Leone.

Subsequent to that occurrence, in October of 1974, he went to the Richmond Memorial Hospital or Memorial Hospital in Florida and a Rhizotomy was undertaken by Dr. Gervin.

Mr. Chiarello stated he also used what is known as a transcutaneous nerve stimulator and that he ceased using it because he said that it burned.

He then continued, and sometime in '75 another myelogram was performed and you heard his testimony, Mr. Chiarello's testimony, as to what he does. He was questiond as to whether or not he drives a car, and he said he drives a car once or twice a week on occasions, that he uses the swimming pool. He said that he does not swim but that he floats about the swimming pool. He states that he experiences pain. That, in essence, as I understand it, is his testimony, and he states that he does not work and has not worked.

He also stated that he found himself in a situation where he was unable to perform sexual activities with his wife

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to any degree of satisfaction.

Mrs. Chiarello testified in essence that she didn't know anything about the accident, she was not questioned, she was not there. She testified that on direct examination, that she and her husband were not having any relationship whatsoever; however, in her examination before trial, which had been taken on a previous occasion, she had testified that she had had sexual relationship with her husband maybe once every two weeks or once a month.

She stated further that she and her children now took care of the lawn and the pool and so forth.

Joseph Chiarello, as a factual witness, merely testified as to what he does on the docks at the different terminals and basically that was the essence of Mr. Joseph Chiarello's testimony. It must be borne in mind that he is the uncle of the plaintiff.

We then come to the professional men who were called here by the plaintiffs.

Dr. Spitz was called. Let's review his testimony in some degree. Dr. Spitz was called and he testified that he was a general practitioner with no specialty at all, and that he treated and further that he was a friend and also the doctor of the plaintiff's father-in-law, Mr. Cardillo; and he stated that he had not taken any x-rays, that he had

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not sent him to any place to review x-rays, and he continued to treat this man in a field in which he was not a specialist. He is the only doctor that came from the New York area who was a treating doctor, although there were three or four or five others who allegedly treated this man, but the plaintiffs' lawyers did not see fit to bring the treating doctors that were here locally to tell you what they observed.

I questioned Dr. Spitz, as you recall, I'm sure, as to his qualifications in this particular field of specialty, and he admitted that this was not his field, that he was a general practitioner.

And I asked him to produce his records, and he brought a card, and I also asked him was he being paid to come here today. And I was told that that was not a very polite question. As a matter of fact, I think I was told it was a stupid question.

THE COURT: That's right, because he is getting paid as a professional man, and I assume any professional man that is brought in to get an opinion was paid.

Let's go on.

MR. SCHULTZ: May I--

THE COURT: No, I struck that testimony and that question, so go ahead to something else.

MR. SCHULTZ: If your Honor--

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THE COURT: Go on to something else. I said I ruled on an objection to your question.

MR. SCHULTZ: In any event, I questioned, and I asked him for his record, and he produced his record, and I offered it in evidence because he told me that he made this record on each and every occasion that this man came, and that he had not copied this record from another series of records or whatever it is.

When I looked at this record I saw that the writing was one right after the other made with the same, obviously in my opinion, the same pen. The record over the long period of time was not fingermarked, it was not ear marked, there was nothing. And I would like you to look at it, if you chose to, to see whether you truly believe that he made this record on each and every occasion or whether he did not make it at some other time one right after the other and wrote it down.

Be that as it may, I asked Dr. Spitz whether or not he knew that this man had hypertension and whether he had examined his blood pressure, and whether or not he felt that this man was obese.

Dr. Spitz, friend of the father-in-law, a man who came here, you saw him, he told us that in his opinion this man did have high blood pressure, that he was obese, and that that factor and those factors would diminish his life expectancy

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This was the plaintiff's only and sole treating doctor.

The next expert that came was a doctor Arthur Friedman, who was a doctor who was recommended by the plaintiff's prior attorney, a Mr. Heckerling. Dr. Friedman examined him once in May of 1973, and then shortly before this trial. He didn't treat him, he was a doctor recommended and supplied by the lawyers whose sole purpose was to come here and testify as to the trial.

He told you, and you recall what he said, that in his opinion this man was permanently disabled, that he had pain, that he had problems with his lower back, and that he would be permanently disabled.

I did not ask him what he was paid--

MR. LASSOFF: Your Honor, can we stop this paid business? We're going into it again.

MR. SCHULTZ: I didn't ask him.

THE COURT: Go ahead.

MR. SCHULTZ: And in fact I asked him very little, because it was my opinion that he supplied very little to this case. It was my opinion that it was obvious that he was a doctor produced by lawyers, period.

Dr. Kaplan, Lawrence Kaplan, was the next professional witness, expert witness. A qualified neurologist, a qualified psychiatrist. I conceded his qualifications.

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He told you that he, too, had been retained by the lawyers but that he conducted an examination on one occasion, and again I didn't ask him what he was paid, either.

And he told you what his findings were. He told you that he found nothing significant in the cervical area, he found no neurological involvement in the neck or the arms, he told you that he had examined three photos of the myelogram that was taken in 1973, and that in his opinion there was a defect, and he only showed you the ones, the three that he used, were of the lumbar area, and he stated in his opinion there was a defect at L4 and L5. He couldn't tell whether the defect was as a result of scarring or adhesions, and he stated that in his opinion this man had a low back condition.

He stated, further, however, that when he performed his neurological tests the tests were not in accordance with the distribution of the nervous system. This plaintiff, Mr. Chiarello, was indicating lack of sensation and neurological tests and signs that did not follow the course of these nerves. There was nothing organically wrong.

Dr. Kaplan stated that he could find nothing organically wrong with the nerve paths, that they were not his responses, Mr. Chiarello's responses were not in accordance with the nerve paths.

He stated that this, I think he said, was psychogenic,

which means that it's not factual, but in his mind.

Dr. Kaplan also stated, and I asked him, because it had not been asked by the attorney for the plaintff, did you find any neurological involvement which would preclude him from having sexual relationship? And he said no. He said further that with relation to this man's right foot he found no neurological involvement.

I asked him, does this require the use of a cane? He said no. Would this man be capable of working at some other job? Answer, yes. As a matter of fact, he said it would be good for him.

MR. LASSOFF: If your Honor please--

THE COURT: You may comment on Dr. Kaplan's testimony in your summation.

MR. SCHULTZ: I asked Dr. Kaplan if this man's obesity and high blood pressure would result in a diminished life expectancy, and he said that it would.

Certain hospital records were placed into evidence. Before I go into that, I would like you to ask yourselves why --why--wasn't Dr. Leone called, the treating doctor? Why wasn't Dr. Gervin, the surgeon, called, the man who operated and performed the myelograms? Why not? I'm sure that the cost of bringing one of those doctors up here, the treating doctors, would not have exceeded what it cost to bring these

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lawyer-brought doctors here. I'm sure of that. But they didn't bring them up here. They didn't bring them. They didn't bring these treating doctors and the operating doctors to stand on that stand and tell what this man's condition was at each and every occasion that they treated him, and the operative procedure. They didn't do that. They chose to use doctors who didn't treat and who were provided by the lawyers.

But let's take a look at some of the hospital records. Now, I'm talking with relation to the Richmond Memorial Hospital. January 30 of 1973. There was a consultation, a medical consultation, and Mr. Chiarello was examined by a medical doctor, not an orthopedist, not a neurologist, but to determine his medical condition. Dr. Sporn in that hospital record said: 36 year old man with a long history of hypertension, for which he has been treated with various medications. The patient has been obese as long as he can remember and has a prodigious appetite, which he does not make any conscious attempt to curb. The physical examination reveals an obese man who does not appear acutely ill. The blood pressure is 145 over 90, and 140 systolic.

Impressions: marked exogenous obesity, heavy cigarette smoking, three packs a day, hypertension, probably related to overweight.

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Comments: feel the blood pressure would probably come down to normal without medication if the patient would lose weight. Have emphasized the importance of this to him.

2. Because of his obesity, a strong family history of hypertension and cardiovascular disease, and his heavy cigarette smoking,, this patient is a good candidate for early difficulties from the standpoint of a coronary disease.

This is again from the Richmond Memorial Hospital, the discharging summary:

His physical examination was remarkable and the obesity present. Because of his hypertension, obesity, it was felt that the patient should have a medical evaluation which was taken by Dr. I. N. Sporn.

This is from the Golden Isles Hospital record, and this is a report made by another medical doctor, Dr. Triberi:

Patient has hypertension and takes medication for blood pressure, which appears to be Elavil 15. The patient smokes three to four packs of cigarettes a day. Blood pressure was 140 over 104, pulse is regular at--I'm sorry, the pulse is 70 and regular.

In October of 1974, this gentleman was admitted to the hospital where a Rhizotomy was performed. And this was described to you, this was described to you as an

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electrical interference and a severing of the nerves in that particular area. This is not done surgica'ly with a knife, it's done with electrical impulse. And it was performed and there's a discharge summary from this Memorial Hospital which says:

This patient is a 37-year-old white male who has had chronic intractable right leg and back pain. The patient previously had lumbar laminectomy and disectomy without relief of pain. He entered at this time for a facet Rhizotomy by radial frequency control. This was done on 10/4/74 bilaterally at L4 and L5, S1. The patient was immediately pain free and is discharged at this time for follow up in the office.

That's done by Dr. Gervin. But they didn't bring Dr. Gervin here to tell us about this pain-free operation or Rhizotomy that he did. They didn't bring him here to say how long it lasted. They didn't bring Dr. Leone to say what happened after October of 1974, after he allegedly was pain free.

What did they bring? They brought his doctors who took the complaints from the plaintiff and then testified here. Ask yourself, why weren't the treating doctors in the New York area brought here? Why didn't they bring Leone, why didn't they bring Gervin? Why not?

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That, basically, as best as I can in the time alloted to me, reviews the medical aspects as supplied by the plaintiffs. They then produced a Dr. Seplaki. Seplaki said that he was an economist who taught school, a teaching economist, had never worked for a bank, never worked for an investment organization, had never been involved in the business world. He lived in the academic world, which is not, in my opinion, the workaday world that you and I live in. And he made certain computations.

When I computed it, I didn't agree with him. I couldn't agree with his figures. He admitted that on certificates of deposit they pay 7.7, straight interest, and if you leave it there it comes up to 8.1. And he said in order to reach $16,000 you needed $500,000. I don't agree with him. It's up to you to determine whether or not six percent of $500,000 equals 16,000. It doesn't, not in my opinion.

In any event, you are the finders of the facts, you know what the situation is in the real world.

If we were to have believed economists, who have made predictions of booms and falls in the stock market, you know what's happened, they don't know what's going on any more than you and I do. As far as I'm concerned, his testimony in this case is worthy of no credence, no interest, no nothing. I don't think he added anything to this case. The only thing

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he did, he did subtract, because he took away valuable time, as far as I'm concerned.

With relation to the defendant , Mr. Girdwood, sitting over there, what did he say to you? He came here, took the stand, told you that he had been driving trucks and busses for twenty years, lived with his wife and family, was a part-time bus driver-truck driver; that on the day in question, June 30, 1972, he was going from the Port Authority to Staten Island, which took him through New Jersey, and he was going to go across the Bayonne Bridge. He said when he got into the area of the Bayonne Bridge he had to make a left turn to go onto the access road. He said there came a point where there was this trestle ten tracks wide. He said there was a grade going down. He said on the other side of the trestle there's a grade going up, which means that somewhere in between these two grades there has to be a low point which was under the trestle. He said to you that that was full of water because it had been raining. They both admitted that it had been raining, Mr. Chiarello and my client. My client said that he had gone through this area on prior occasions. He said it gets flooded under that trestle, and I leave it to you, as reasonable ladies and gentlemen, you know that water goes to the lowest point. That was the lowest point in the roadway. This place where these two grades came down

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underneath the trestle, and he said it's always flooded.

Mr. Chiarello said to you it wasn't flooded but that there was a puddle up the grade at a slight depression ahead of him. But he says that the trestle area, the lowest point in the roadway, was not flooded.

You might ask yourselves, what difference does this make in one sense? It makes this difference: that Mr. Chiarello may not be reporting accurately to you. He may be interested, and is interested, in the outcome of this law suit. And if he doesn't report accurately to you about where a puddle would normally be, he may not be reporting accurately to you on other factors.

In any event, Mr. Girdwood said to you that he went through the puddle and that it was, in his estimate, about nine inches deep. So when he went through, he went through, I think he said, 20 miles an hour. He said there were these cars ahead of him. When he went through, when he was about 75 feet away from these cars in front of him he saw the stop lights come on. He said he applied his brakes, the roadway was wet, the bus didn't stop and he said that he came in contact with the rear of Mr. Chiarello's car; that the vehicle in front of Mr. Chiarello's car had stopped and then had started, apparently stopped.

Mr. Chiarello's car struck the vehicle ahead of him.

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However, he went a little further. He said Mr. Chiarello got out of his car, went to the trunk, opened the trunk, went back to the car, then came back to his bus, then returned and went back again and he said he saw no signs of injury to Mr. Chiarello, didn't see any difficulty in walking or bending, and I say to you there's a ring of truth in Mr. Girdwood's testimony because when they asked him how did he appear to you, he said he appeared shaken and white, that's true, probably was, but he also said he didn't see anything wrong with him walking around.

So you have discrepancies; the major one, of course, is where was this puddle? Was it down under the trestle, the lowest point, as Mr. Girdwood tells you? And did that cause his brakes to be wet? Did that cause his bus not to operate as it normally would? Was Mr. Girdwood negligent, or did this occurence arise as a pure accident, without negligence because of the weather conditions, the flooding and the stopping of the cars in front of him? You have to ask yourselves, what did Mr. Girdwood do that a reasonably prudent man under the same circumstances would not have done? Was he negligent? Did he act other than what a reasonably prudent person would do?

I submit to you that he was not negligent, that he acted as an ordinary, reasonably prudent person would do under

those same circumstances. This was an accident in the truest sense of the word without negligence.

Now, let us, if you will, take a look at the witnesses who were called as expert witnesses in behalf of the defendants. Please remember that the defendants cannot produce treating doctors. We didn't treat this man. Our doctors didn't treat him. They're only entitled to examine. We cannot produce the doctors who treat.

So, in order to determine what happened with this man, we had him examined by Dr. Baird in Florida in February of 1975. And what did we do? We brought Dr. Baird here from Florida so he could tell you what he observed. Couldn't they have brought Dr. Leone and Dr. Gervin to give to you all of the facts? No, they didn't. But we brought Dr. Baird up from Florida. And you knew that he came off the plane, came here and that was it. He told you his office was in Florida, and he told you that he examined this man. In fact, his report was placed into evidence by the plaintiffs, the attorney for the plaintiffs, I'm sorry.

Now, Dr. Baird came here, as I told you, from Florida, and he couldn't tell you of his own knowledge what operative procedures were performed. He couldn't tell you what was done at the Rhizotomy, he couldn't tell you about the treatment; he saw the man once for the purpose of conductin

an examination to determine what his condition was at that time.

In February of 1975, he reported that he found that this man had a problem with his lower back and he said that he had a ten percent disability in 1975. But what is important is that he agreed with Dr. Kaplan that his man's responses to tests were not in accordance with anatomical distribution. He couldn't find any neurological involvement. He found no reason for this dropped foot. In fact, he said he couldn't see any reason why the man used a cane.

However, the thing that I think you should consider is, if this doctor, who only examined once, could come and tell you what his findings were so that you could find all of the facts as you should have them. Why didn't they bring these other doctors from Florida who would be important to you, because they operated and they treated? But the lawyers didn't do that. It's the lawyers. What did Mr. Lassoff do with Dr. Baird? He tried to have Dr. Baird provide the deficiencies of not producing Gervin, Drs. Gervin and Leone. He had him read the operative chart, and he wanted him to explain this and explain that.

But Dr. Baird didn't do the operation; he didn't do the Rhizotomy; he didn't do any of that. He only examined to find out this man's condition as of that date.

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Stop and think. You saw what went on here, it was only yesterday. Why did they do that? Why didn't they just question him as to his findings? Why did they attempt to provide the deficiencies?

THE COURT: Mr. Schultz, you're over your requested time. You may have another five minutes.

MR. SCHULTZ: All right, sir, I'm sorry.

Dr. Baird stated that this man reached his maximum medical improvement. He said he felt he could work, could do work that doesn't require him to lift or to bend. Other doctors said the same thing. I then produced, because it was necessary to have an up-to-date or current evaluation of this gentleman, I asked Dr. Gould to examine him just last Monday, because the man had come up from Florida.

You saw Dr. Gould. 74 years old, with a hearing deficit, a graduate of Yale Medical School in 1924, head of neurology at Queens General, a gentleman who knows or is qualified, a diplomate in his field, as was Dr. Baird, a diplomate in his field.

And what did Dr. Gould say to you? He said he examined him, found nothing wrong with his neck and his arms, no neurological involvements. He said with relation to sensation, he said this man again, in respoinse to tests, gave responses that are not in accordance with the distribution

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of the nerves. He said it was strange, he said he had nothing on the back of his hand but when he turned his hand over he had sensation. The same nerves for the back and the front. Yet on one side he had none and on the other side he does.

He said he found the ankle jerk sluggish, he said he couldn't understand the grip thing. He said if this man of his weight walking with with a cane and gripping a cane, he'd have to have a good grip, yet he complained of lack of grip in his right hand. He couldn't see any reason for the cane. And he said to you in his opinion this man is capable of doing other than strenuous work.

So in summation, when you examine all of this evidence together there's no question that there was an accident, and that there's no question that this man had an injury. Whether it came from this accident is a question for you to determine. This man had been working on the docks lifting heavy materials before this accident, sliding doors. Did this accident produce this injury?

The next question, was Mr. Girdwood, the defendant here, was he negligent? Did he act other than as a reasonably prudent man would act? Are you going to require him to respond in damages to this Mr. Chiarello?

If you reach the conclusion that my client was negligent, and if you reach the conclusion that this accident

caused this condition, I say to you Mr. Chiarello is not as hur and is not as disabled as he says he is. He's not as hurt and disabled as the doctors provided by the lawyers say he is. All of this is up to you.

I can only ask you to do this: I do my task of attempting to lay as much of the evidence as I can before you, which I did. If I have been deficient and I have not laid it all out as it should be, I ask you not to punish my clients because of that. Use your god-given intellect to see that you do justice to both of these people. I think if you do that all will be well. I thank you.

THE COURT: You may sum up.

MR. LASSOFF: Thank you, your Honor.

Can I get the exhibits?

MR. SCHULTZ: Here they are.

MR. LASSOFF: May it please the Court, Mr. Schultz, Madam Forelady, ladies and gentlemen of the jury.

It is amazing how simple cases become complicated. We have an accident that occurred so simply that in point of time it could not have taken more than five seconds. Yet we're spending days here.

I'm going to spend maybe five minutes on the liability because I want to show you how absurd the defense is that this bus driver acted as a reasonably prudent person.

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Mr. Chiarello testified as to the happening of the accident. He told you that he wanted to go home and he was going to take the Bayonne Bridge from New Jersey where he worked to Staten Island where he lived, and he was on an approach road. He told you that he went through this dip in the road where there was a railroad trestle, and he told you where that dip of the road is there are sewers and drains. The only part of the road that has them.

The accident happened on June 30, 1972. There are no leaves to block up sewers on June 30th, there is nothing to block up sewers or drains. The purpose of the sewers and drains at that particular part of the road was to get the water off the road.

He said that he went through the dip going between 15 or 20 miles an hour, and that he was following the car in front of him, there was another car in front of that and another car in front of that.

And that this dip in the road was wet but there was no collection of water. Up ahead some 100, 150 feet he saw a car proceeding slowly through a puddle of water. The car in front of him stopped to let that car go through, he came to a stop ten feet behind that car, and sometime later, after he said he saw that bus come out of the dip coming hard, he was struck in the rear and propelled hard enough to

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strike the car in front which was already moving forward, and to bust his radiator in front and to break the seat, the metal seat, and throw him flat on his back; and then he was tossed up in the air again and thrown over the windshield when it hit the car in front.

Okay. Mr. Girdwood says, "I saw the cars in front of me. There was a solid line of traffic. We all went through this pool of water, nine inches deep, 25 feet wide, at a speed of 20 miles an hour. I came out of the dip, I saw Mr. Chiarello's brake lights, I was 75 feet away." All right.

We have some drivers on the jury. When you see brake lights, your eyes see them. They transmit a message to your brain, your brain tells your leg to get off the gas pedal and step on the brake.

Now, you figure out how long it takes. Even if you see the lights the second, the instant that they go on, you still have to see, perceive, take off, put here.

A second in time. If you say 1001, 1001 is a second. That bus, going at 20 miles an hour, covered 30 feet in one second. It would take a second or almost a second just to get your foot from the accelerator to the brake.

So, we are now 45 feet behind Mr. Chiarello's car. Mr. Girdwood himself told you that on a dry day it would take him 50 to 60 feet to stop his bus going at 20 miles an hour,

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and longer if the road was wet. From his own testimony there was no way that he could possibly stop his bus in time to avoid this accident. He was tailgating, he was following too closely, and remember he told you he had instructions from the bus company, the prime defendant in this action, the Domenico Bus Company, not to follow too closely.

Why was he following too closely? If you remember, the beginning of his testimony, he said he was delayed. He was late. He would ordinarily be finished with this run by seven o'clock, and here he is at the entrance of a bridge in New Jersey. He still has to go all through Staten Island, and into New York, and he's late and he's trying to make up time.

Reasonableness? Is Mr. Girdwood's story true? I think he knows that Mr. Chiarello is seriously hurt, and the mind of the person has to try to avoid responsibility in some way.

So he came up with this pool of water which made it easier for the accident to happen.

I want you to think of something. According to Mr. Girdwood, all these cars shot through a pool of water nine inches deep by 29 feet long at 20 miles an hour, yet when they came up ahead to a little puddle in the road, three or four inches deep,they stopped and went through this puddle slowly. But they shot through a dip where you know the water

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is going to be deep at 20 miles an hour. Does that make sense to you? Why would these cars stop at this little three, four-inch puddle when they went through a nine-inch puddle at 25 miles an hour? Logic? Realism?

Obviously there was no nine-inch puddle, because all the cars would have gone through slowly. Those of you who drive cars know when you see a deep puddle you go through very slow. You don't zoom through it. You try to disturb the water as little as possible, which is what the people up ahead did when they actually saw a puddle. They stopped, and let one car proceed, then the next car would proceed. They didn't go zooming through there at 20 miles an hour.

Mr. Chiarello said he saw that bus coming hard, and the bus was coming hard because the bus driver from down below in the dip couldn't know until he got to the top of the [illegible]hat there was a puddle in the road ahead; which would make the cars in front of him stop.

Now, I had Mr. Chiarello himself take photographs of this road because I knew it had not changed and I thought it was important for you to see the road.

The first photograph in evidence, which is Plaintiff's Exhibit 1, shows this railroad trestle. It's back here. It's not a very good picture. Mr. Chiarello doesn't take very good pictures. He says when he took this picture the

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place where the accident happened is still further back here, and he shot it towards the trestle to show you that.

Mr. Girdwood says the place the accident happened is here. However, when we get to the other three pictures, strangely enough, both people placed the accident at the same place, which is past the shed, this bus stop, which is not shown in this picture, by a sign that says "Bayonne Bridge." I think you can see it pretty clearly here. Which once again is not shown in this picture. And what is the significance of that? The significance is that actually, if you look at the picture, this accident happened a lot further than 75 to 150 feet from the dip. If you look at the picture, it would have had to have happened at least 300 feet past the dip. So that he actually had a heck of a lot more time than he's telling you.

I want you to also realize that the testimony as to Mr. Girdwood's speed is his testimony alone. I want you to know that if he was going 30 miles an hour, he would have been covering 45 feet a second. The measure of speed, and it's mathematical, you can figure this out yourselves, if you divide 5,260 feet by 60 minutes and then divide that figure by 60 seconds, you get the amount of feet a car covers per each mile of speed per second. The mathmatical formula, I think, is exactly 1.48 feet per second for each mile of speed.

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But it's simple mathmatics, it's not a secret. It's a simple mathmatical calculation.

Now, under any story, including Mr. Girdwood's, he had no earthly way to stop his bus in time to avoid hitting Mr. Chiarello, and what is more significant, this is supposed to be a professional driver, a man who drives for a living, and yet when I asked him how many feet his bus would cover, he didn't even know that. He said, "I don't know, maybe 20."

Here's a man who is driving a bus, carrying passengers, and he doesn't even know how fast his car goes in feet per second. How can you stop a car in time when you don't know how long it takes or how far it takes? You tell me, I don't know.

I want you to understand that this bus, 38 feet long, eight feet wide, had 52 people on it. If you give an average weight of 150 pounds per person, it's carrying 8,000 pounds of weight. Simple common sense again. Never mind the weight of the bus. The weight of the bus, the more weight you have, the more power you have to have to move it. The more power you have to have to stop it. We're not talking about a Plymouth Valiant, Scamp or a Dodge Valiant Scamp, which is a small car, you're talking about a massive vehicle, a lethal weapon.

Under those weather conditions that man should have

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taken every precaution in the world to make sure that he was in no position to be close enough to come into contact with any motor vehicle. He did nothing. He zoomed through a puddle, according to his testimony, if you believe it, a nine-inch deep puddle, at 20 miles an hour, and he came up on that highway going straight ahead and he had no way of stopping this accident. And his own testimony shows you that.

I asked him, "What did you say to Mr. Chiarello?" He said, "I'm sorry." That's what he said to him right at the scene of the accident.

That's all I'm going to say about liability. I don't think there is any question but that this man was negligent. Now, he's sitting here in the court in an attempt to get sympathy in this case. The primary--

MR. SCHULTZ: Your Honor, I respectufully object and move that that be stricken.

THE COURT: He has as much right to be in this courtroom as a defendant, as your client, to be as a plaintiff.

MR. LASSOFF: I don't say he has not.

THE COURT: Maybe your client is here to get sympathy, Mr. Lassoff, with this standing up and down every five seconds and walking around in the courtroom. Now, don't do that again.

MR. LASSOFF: All right.

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THE COURT: Because it cuts both ways.

MR. LASSOFF: The primary defendant in this case--

MR. SCHULTZ: Your Honor, I would respectfully object to that designation, too, your Honor, "primary defendant.

THE COURT: They're equally liable, if they're liable at all.

MR. LASSOFF: That's true.

Now, let's get to the injuries. The bus driver admitted, when he saw the man, he was white and shaken, and Mr. Chiarello himself told you that he was asked if he wanted help and he said he didn't want any help. He was pushed across the bridge, taken home, called his family doctor, a Dr. Rothman, who was away on vacation, that's the testimony, went to Spitz Monday morning.

This happened Friday night, went to Spitz Monday morning, and Spitz is a rare breed of man. We don't have too many like him anymore. He's a GP and he's proud of being a GP. He treats patients, He doesn't have a fancy title, and he doesn't have a fancy office, but he's the one that you go to when your children get sick or you have problems.

He has probably more generalized knowledge of medicine than Dr. Kaplan or Dr. Friedman or any doctor here, because he has to deal with everything. And he finds, on that very day, an acute tortocollis sprain of the neck, and

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a low back derangement.

He sees him two days later and refers him to a Staten Island hospital for traction and therapy.

We have the Staten Island hospital record here. It's in evidence. We're not talking about--there's even a small bill from that hospital for $62 for the treatments, which is the only medical expense I have proven in this case.

He's treated by a Dr. Urs, and if you recollect the testimony, Dr. Kaplan reviewed Dr. Urs's reports. Dr. Lanier was the consultant, the orthpedist, that Dr. Spitz sent him to. He didn't treat Mr. Chiarello. Dr. Friedman, the plaintiff was sent to by a man by the name of Heckerling, who was Mr. Chiarello's lawyer's brother-in-law.

Really, the only treatment that Mr. Chiarello got in New York was from Dr. Spitz, and he saw him until he moved to Florida. You've got the card, all the dates of the visits are on the card, every single one.

And, incidentally, they are not all the same pen, if you look at it. I have never heard such poppycock in my life.

He treats him until he goes to Florida. He sends him to specialists. You have heard of a Dr. Lanier and a Dr. Leventhal who wanted to put him in Richmond Memorial Hospital in Staten Island, and you heard Mr. Chiarello said that at

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that time the pain in his leg, and that was so bad that he had to do something and there was a flu epidemic in the city of New York. You think about the time of this. This was in December, late December, early January of 1973, and was there a flu epidemic in New York? They were not taking patients for beds except for vital emergencies.

So he flew down to Richmond, Virginia--I think he said he was driven, excuse me--to Richmond, Virginia, where he had a relative who was connected with a hospital, a doctor. That doctor had nothing to do with any treatment rendered to him at the hospital in Richmond, Virginia.

You remember the name, it was an Italian name, the doctor who examined, treated, performed the myelograms in Richmond, Virginia, and the reports are here, incidentally. I put into evidence something like fourteen exhibits of which twelve are in, and you have a right to ask to look at these exhibits, and they're very important, that's why they're here.

The myelogram was performed by a Dr. Rennie, R-e-n-n-i-e. Dr. Rennie, who admitted him, says that his man has--look at the report--mild obesity. Mild.

Dr. Sporn, you remember Mr. Schultz told you about Dr. Sporn? And about the hypertension and reduced life expectancy? Well, Dr. Sporn, if you read his report, says that if he reduced his caloric intake 1600 calories a day, in

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his opinion, his high blood pressure and hypertension would disappear and he would be normal. That's the seriousness of his hypertension. And it's in the hospital record.

They do a myelogram, not only of the back but of the neck, in Richmond, Virginia. The back shows a herniated disc at L4, L5 level. It shows, and there is a diagnosis.

Hospital records are interesting things. You find all sorts of goodies in them. Cervical sprain with cervical radiculitis, lumbar disc herniation partial, and I believe an EEG was done--an EEG, where, if you check the notes without going into them, it says, "Patient in obvious pain."

Now, you have heard me use the word "intractable" here, and you heard Dr. Kaplan use the word "intractable". What's important about that? It's not a word that Dr. Kaplan made up. The word "intractable" is used in the Richmond Memorial Hospital record in January of 1973. It's used in the Golden Isles Hospital record in August of 1973. It's used, and as a matter of fact it's the first thing used, on the Rhizotomy, final diagnosis--this is the final diagnosis after the nerves were destroyed--"intractable pain, back and leg." After the Rhizotomy, final diagnosis.

Now, Mr. Chiarello testified before you in great detail. I have a list of injuries that the doctors went into that covers three pages. The reason we didn't bring Dr.

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Gervin or Dr. Leone here--

MR. SCHULTZ: Your Honor, there is no testimony in this case--

THE COURT: No reason.

MR. LASSOFF: Without a reason, Dr. Gervin's reports and Dr. Leone's reports are all in the hospital record.

MR. SCHULTZ: If your Honor please, I'm going to respectfully object. There is no testimony that they're all in there.

THE COURT: Overruled. Dr. Gervin and Dr. Leone's reports appear in the hospital record.

MR. SCHULTZ: It doesn't say they're all there, your Honor.

THE COURT: That's up to the jury.

MR. LASSOFF: You can read Dr. Gervin's reports. The operation that you heard described is Dr. Gervin's report. Prior to the operation you heard described, there was a report from Dr. Gervin in great detail, and I'm going to read that report to you now.

"This 36-year-old white man was involved in an automobile accident in June, 1972. He suffered a flexion-extension injury to the neck, as well as a low back injury. Initially, he was seen and cared for by a neurosurgeon on Staten Island, who wanted to hospitalize him for myelography.

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The neck and right shoulder pain, which existed after the injury, began to decrease somewhat. Concomitant with this, however, was increasing low back pain with right lower extremity difficulty. The history is long and lengthy. He has seen multiple physicians, one of which performed a myelogram which revealed a blockage at the neck, as well as a herniated lumbar disc. His current complaints are of persistant paroxysms of right occipital nerve, pain in the right neck radiating into the right shoulder with numbness in the right hand and weakness of the right hand. He also has noted an inability to fully elevate the right shoulder. He has taken to walking with a cane the last nine months, as the right extremity gives out. He has noted persistant right buttock pain with radiation in a sciatic fashion down through all toes with numbness in all toes. He denies sphincteral disturbances. Sexual function, although able to attain an erection, he cannot fully maintain it.

"Neurological examination. General appearance: he was an alert, husky man walking with a right-handed cane, favoring the right lower extremity.

"Head: examination revealed a small nubbin and Tinel's sign over the superficial aspect of the greater occipital nerve on the right as it becomes superficial between the trapezius and semipsinalis capitis muscle."

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THE COURT: The whole problem with reading is that the jury doesn't understand what you are reading and neither does the Court. If you wish to continue to waste summation that way, you may.

MR. LASSOFF: There's more, I will skip part of it.

"Upper extremity revealed deltoid weakness, biceps weakness (moderate), mild triceps and hand weakness, all on the right. The right lower extremity; he had mild atrophy of the gastrocnemious on the right, as well as, a mild foot drop.

"Impression: At this time, we have multiple problems. This man demonstrates an entrapment neuropathy of the right greater occipital nerve. He demonstrates radiculopathy of the right C5, 6 and 7 nerve roots.

"In addition, there may be a myelopathy as described by the blockage on the myelogram, as well as an intermittent left Babinski.

"3. Undoubtedly, this man does demonstrate a herniated L4-5 and/or L5-S1 disc on the right side."

That's before the operation.

Now, Dr. Gervin, the operating neurosurgeon, did go in and he did do the operation, and he found more than he bargained for.

He found, when he cut this man's spine open, that

as a result of this accident there had been epidural adhesions or scarring, which, as you heard Dr. Kaplan say, came from hemorrhaging, and this hemorrhaging was within the spinal canal.

Now, I want you to think of the force with which Mr. Chiarello's car was hit. It was hit with enough force to snap the seat of this two-seat car off and fling him flat with the seat on his back. Mr. Chiarello is not made of steel.

Listen to this. Besides the disc that they took out, "there was marked epidural scarring and marked epidural venous engorgement."

We go on a little further. "The nerve root was seen to be markedly adherent with scar and frayed."

So that we have more than a herniated disc. We have the nerve root, the place where pain emanates from, markedly scarred, frayed and adherent.

As you heard Dr. Kaplan say, the reason for this man's pain, and the reason they can't fix his pain, is that this scar tissue is there, that it's causing pressure on the nerve root and that further surgery will not take it away. In fact, it may increase the scar tissue, and that this man shouldn't have further surgery.

Mr. Chiarello has described the pain to you as being

something like someone sticking a knife in your spine and turning the handle and twisting it. Now, that sounds dramatic, doesn't it? Most of us never experience that kind of pain but we do experience certain kinds of pain and we do experience certain kinds of pain with nerve roots. If any of you have ever had root canal work on your teeth--

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

MR. LASSOFF: That is a little tooth with a nerve root, root canal work. Do you remember the agony that was? This is the spine, and this pressure doesn't go away, and it can't be taken away. It's intractable. And he has lived with this day after day after day after day. And he has contemplated suicide and tried suicide, and the pills--

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled. That was in the record.

MR. SCHULTZ: Not an attempt, your Honor.

THE COURT: Yes, it was.

MR. LASSOFF: And he cannot be trusted with his medication. You heard testimony that after this operation he was screaming in the hospital, "Cut off my leg, cut off my leg " and he pulled out the intravenous solution.

This man has had to live for three years and seven months now with increasing pain. Because, as you heard from

all the doctors here, the best that can happen to him is scar tissue doesn't get worse, it may get worse. I think it has gotten worse, I think there is no question about that. I think that the myelogram that Dr. Kaplan interpreted to you--remember he showed you the new defect?--I think there is no question there's more scar tissue or that disc has reopened and more material is protruding.

There's nowhere he can go. Nowhere he can go. They gave him this machine, it didn't work. This transcutaneous skin thing. They did a Rhizotomy, and you heard Dr. Gould. What did he say? I asked him, "What do you do a Rhizotomy for?" And he said, I didn't put it in his mouth, he said, "for terminal cases."

You can't stop pain any other way, and it didn't stop the pain. It stopped it initially, it stopped in his leg and it came back. And you heard him say it didn't come back? Well, you can base the whole case on that. Here's the hospital record where the Rhizotomy was taken, and you look at the final diagonsis. We're not playing games here. "Intractable back and leg pain." That's the diagnosis. "Intractable."

What are we talking about? We're talking about a man who, at the time of this accident, was 35 years old. He was six foot two and a half inches tall, was 265 pounds, and he told you that at age 17 he was 235 pounds. You can see

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Mr. Chiarello, he's a big man. I wouldn't call him fat. He's large. He may be somewhat overweight, but he certainly is not extraordinarily overweight. For a man his size, he's put on a few pounds. He likes to eat, that's a crime. He likes to smoke cigarettes, that's a crime. He might at one time have enjoyed having relations with his wife.

He worked at the age of eight learning the stevedoring business. He went into the United States Air Force, he was a pilot instructor and he worked on motors. Came back out of the air force and went to work for at that time what was one of several family companies, which they no longer own, as a pier superintendant, terminal superintendant.

He worked day after day, year after year. He told you the work he had to go. This was a working job; it wasn't a sinecure. Because if your family owns a company, they want to give you a sinecure and they want to give you a good job. They don't pay you $16,000 a year. This is a working man.

As a result of this accident, we were honest enough to tell you that for the first six months after this accident he got paid the salary in full, the regular base salary. The only thing they didn't pay him was the $50 extra he would get for Saturday or Sunday work. But for the six months after the accident his employer, Universal Terminal and Stevedoring Corporation, paid him his salary in full.

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Since that day he has not received a penny of salary from anywhere, nor will he.

What are we talking about? The actual figure in 1971, the year before the accident, was 16,000 and a few dollars. It makes all of our lives too complicated to add a few dollars and it's easier to calculate at 16.

It is now, since he stopped getting paid--and I'm going to make it still easier, let's fugure the date that his loss of earnings started as January 1, 1973--it is now three years and half a month since then. At $16,000 a year that would come to approximately a little less than $49,000 in past lost earnings, earnings up to today.

The reason I split loss of earnings in the two different functions, of course, that money that you should have earned before there is no present value of. This is money that was due you before this. You can't deduct money from money you already should have had. So I deduct that.

Now, Mr. Chiarello on Wednesday of this week, January 14, was 39 years old. So he has 26 years more of work expectancy. We assume that a working man will work until age 65. I think it's safe to say that a working man, a family man, with three children would ordinarily work to age 65.

26 years at $16,000 a year comes, I believe, to

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$416,000 at a straight line figure loss of earnings. Of course, we're not dealing in straight line figures, we're dealing in what loss of earnings will make this man whole. We'll get to pain and suffering later because that's the crux of the case.

You heard my economist come in and testify that present value of enough money to give Mr. Chiarello an income of 16 to $17,000 a year, that's with present value deducted, would be $500,000, without inflation added. With inflation added, and he was going at a future inflation rate of six percent, it would be $600,000.

I think he was being very kind, this economist. Remember what he said? In 1974 the official inflation rate in this country for the year was 14 percent.

Last year the official inflation rate was eleven percent. And yet he's giving Mr. Chiarello the figures based on six percent only.

You heard some talk about CD's or convertible debentures, and the interest you can get, and as Mr. Schultz told you, to get that 7.7 percent interest you've got to put the money in for six years. What does he live on for six years, air? The man is going to do what you or I or any ordinary person is going to do, you're going to put it in a savings bank. And a savings bank where you don't have to

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tie the money up for a term, maximum rate, at least in this state, is five and a half percent.

So, as far as the loss of earnings go I'm going to ask you to award Mr. Chiarello $40,000 for past loss of earnings and $600,000 for future loss of earnings. Remember when I opened to you, I told you at the end--I begged you to pay attention because I told you we were going to be talking about millions, and we are.

The hospital record from the Golden Isles, which is in evidence, has a sheet attached from the Biscayne Hospital, stating that the hospital bill was no longer available. We're not concerned with hospital bills or doctor bills. I'm not going to go into those. Irrelevant. I don't care if they were a dollar or a hundred thousand dollars.

I'm going to talk to you about pain, intractable pain. What is pain worth? I would like each of you--we all use our common sense here, we have to use our experience--to think of the most painful thing that you have ever experienced and apply that and then consider the description of pain that Mr. Chiarello gave you, a knife being twisted in his spine.

I say to you that for a man with three children, and an attractive wife, to contemplate suicide, the pain must be overwhelming.

You know, life is not all it's cracked up to be. Living is difficult, dying is easy. This man has responsibilities. Then he had to consider them. He doesn't want this pain, he's not enjoying his life, but he's got three kids, he can't saddle his wife with that. He's got to live and take this.

What is the pain worth? I'll tell you what it's worth, and you think about it. It's three and a half years since this accident, three years and seven months, to be precise. I say to you for that three years and seven months the kind of pain that Mr. Chiarello underwent is worth at least $250,000 a year. About $875,000. He has a life expectancy of 32.06 years, and you have heard some nonsense about hypertension and smoking. Well, life expectancy tables deal with the population as a whole. It doesn't mean anyone is going to live that long. We do know that Mr. Chiarello's father, who has the samy history, is still alive.

MR. SCHULTZ: I object, your Honor.

THE COURT: I'm sorry. It's stricken.

MR. LASSOFF: You can check that in the hospital record.

THE COURT: I won't allow the jury to use the hospital record to prove that fact as of today.

MR. LASSOFF: All right.

This is just an estimate of what an average person would be expected to live. I don't know if Mr. Chiarello is going to live to be 100 or he's going to die at 40, but I say he's 39 now, there's no heart trouble or any trouble of any kind except the pain in his back and in his neck and in his shoulder. And this is even though you have heard the massive doses of medication he takes, and there is still trouble.

So you've got 32 years to figure future pain and suffering, and that is not going to decrease, but I'm not going to ask you to give him $250,000 a year for 30 years.

MR. SCHULTS: Your Honor, I'm going to respectfully object to this.

THE COURT: Overruled.

MR. LASSOFF: Do you want to know why? The pain doesn't lessen, but the human vitality gets less and you don't feel the pain anymore. It's real, you don't care, you suffer but you don't suffer as intensely. Hope goes, the vital parts of the body go, and while you endure the pain it's not the same pain, because you really don't care.

I ask you to give him $100,000 a year for the next 32 years. I think that is fairly reasonable.

Now, that's Mr. Chiarello's case. Mrs. Chiarello has a very real cause of action and the law in this state, in this country, is a fairly new cause of action. For years

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the only person who could sue for loss of services in society, a husband could sue for his wife but not the reverse. Only in the last couple of years has the wife been allowed to sue for loss of consortium, the loss of society and the loss of companionship of a husband.

Mrs. Chiarello, at the time of this accident, was a mother, a wife and she was 28 years old. She was and is a good looking woman, she had three children.

How has this affected her? She says she has accepted the fact that she has no sex life. She says she's accepted it, I think we all expected something different. You didn't get it. What other choice does she have? She could divorce her husband, she could become an adulteress or she could accept the fact that she has no sex life. She's accepted it.

What's it worth to a 28 year old woman, a mother, with three children, to accept the fact that she's no longer a wife and only partially a woman? What's it worth to her to have a fourth child but a differnt kind of child? You know, when you have children your children have good days and they have bad days. They do things that disappoint you, and they do things that make you proud. Every day with Mr. Chiarello, Mrs. Chiarello's fourth child, is hell. Every day.

I ask that you award Mr. Chiarello, for the additional work that she's had to do, the additional

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responsibility of raising a family, for the additional problems this has caused, for the lack and loss of a normal marriage relationship, $1,000,000.

I don't want to beleaguer you too much more. You have heard talk about a swimming pool and you heard Mr. Chiarello say that the only relief from pain he gets is floating in that swimming pool where the weight of his body is off his back. The only relief.

I want you to picture this for the next ten, twenty, thirty, forty, fifty years, as long as Mr. Chiarello lives, I want you to picture that swimming pool in Florida and the blob floating in that pool, a blob that used to be a man with a heart and a mind, used to be active, intelligent, productive, useful, floating in that pool in an attempt to gain relief from pain. That is Mr. Chiarello's best part of his life and the best part of what he can expect.

To go over this briefly, I have asked you to award $49,000 for past loss of earnings, 600,000 for future loss of earnings. For past pain and suffering, $875,000, for future pain and suffering, $3,200,000, and I have asked you to award Mrs. Chiarello $1,000,000. It's a lot of money.

I told you in opening I was going to ask you for a lot of money. It's a lot, a lot of money. I don't even know what good it will do Mr. Chiarello, but that's what the

injury he got is worth and that's what I want you to do. I want you to do justice to your conscience as jurors. If you do that, we could all only be satisfied. Thank you.

THE COURT: Ladies and gentlemen, my charge will be short and I think maybe it would be better if I give it to you and then you can go out and have some lunch.

Is that all right with you or do you want a short recess? By short, I mean twenty minutes.

We will give you a five-minute recess.

THE COURT: I want to see counsel.

(Jury excused.)

THE COURT: These are the questions I will submit to the jury. You can look at them and make comments.

(Discussion off the record.)

MR. LASSOFF: No objection, your Honor.

MR. SCHULTZ: I have no objection.

(Recess.)

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dh:mq 1

(Jury present)

J. Metzner

THE CHARGE OF THE COURT

THE COURT: Mrs. Cohen, ladies and gentlemen of the jury:

We have now reached the point in this trial where you are about to enter upon your final functions as jurors, which is, of course, one of the sacred duties of citizenship.

You have given careful attention to the evidence during the course of this trial and I am certain that you will conduct your deliberations in the same fine spirit that you have so far displayed, and with impartiality and fairness, reach a just verdict in this case.

In our court system, the function of the judge and the functions of the jury are clearly defined. It is my duty to instruct you as to what the law is. It is your duty to accept the law as I charge it to you.

Just as I am the exclusive judge of the law, so you are the exclusive judges of the facts. You alone determine the credibility of the witnesses, and the weight and effect to be given to the evidence.

It is up to you to determine what the facts are from the evidence in this case and from those facts

decide whether the plaintiffs have sustained their burden of proof on the claims which they have presented against the defendants.

Thomas J. Chiarello, one of the plaintiffs, seeks to recover damages from the defendants Domenico Bus Service Company and its employee, Henry Girdwood, for injuries which Chiarello claims he suffered on June 30, 1972, because of the negligence of Girdwood in driving the bus owned by Domenico.

Chiarello claims that as a result of these injuries he has already lost substantial income and endured considerable pain and suffering which he asserts will continue in the future.

I should point out to you at this time that the owner of the bus is responsible for injuries caused by the negligence of its driver and that in this case if Girdwood is found liable to pay damages to the plaintiffs, then Domenico Bus Service is jointly liable for these damages.

Of course, if you find that Girdwood was not negligent in the operation of his bus, then neither defendant is liable to the plaintiffs.

Plaintiff, Angela Chiarello, Thomas Chiarello's wife, seeks to recover damages from Domenico for loss of

consortium due to injuries suffered by her husband, which she claims resulted from Girdwood's negligence.

While a claim for loss of consortium by Angela Chiarello is made only against the bus company, it cannot be liable for such damages unless you first find that the injuries complained of were the result of the negligence of the bus driver Girdwood.

Both defendants claim that Girdwood was not negligent in the operation of the bus, and even if he were negligent, that Thomas Chiarello's injuries are not as severe as claimed.

This trial has been a short one, and you have just heard the summations of counsel, in which they pointed out the various portions of the proof on which they say you should rely to render a verdict in their favor.

I see no reason to further detail the contentions of the parties or the specific proof to substantiate those contentions.

In determining the issues in this case, it is your recollection of the testimony that is to control, and not that of either counsel.

Statements made by counsel in arguing the admissibility of proposed evidence and colloquies between the Court and counsel with respect to admission or rejection

dh:mg 4

of such evidence are not evidence, and are not to be considered by you in your deliberations.

The summations of counsel which you have just heard are not to be considered as evidence, but only as arguments to you as to what counsel feel you should find from the evidence.

If, during the course of this trial, the Court sustained an objection by one counsel to a question asked by the examining counsel, you are to disregard the question and any alleged facts to be contained in the question.

If a question has been asked and an answer has been given by a witness, and I have then stricken the answer from the record, you are to disregard both the question and the answer in your deliberations.

The only evidence you can consider is sworn testimony and documents admitted into evidence.

In this case, there is no question that in the early evening of June 30, 1972, the bus owned by Domenico and driven by Girdwood collided with the rear end of Chiarello's automobile which was standing still at the time.

However, the mere fact that an accident occurs is not evidence of negligence and does not mean that the plaintiffs are entitled to recover damages.

dh:mg 5 550

The burden of proof in this case is upon the plaintiffs.

In order for you to return a verdict in favor of either of them, you must find that each has proved, by a fair preponderance of the evidence:

First, that Henry Girdwood was negligent in the manner he operated the bus; and

Second, that his negligence was the proximate cause of the accident.

Negligence has been defined by our courts as the absence of due care in doing or in failing to do an act which results in injury to someone to whom a duty of care is owed.

Due care is such care as the ordinary, reasonably prudent person would use under the same or similar circumstances.

In this type of case, Girdwood owed a duty of care to the plaintiff to operate his bus as the ordinary, reasonably prudent driver would under the circumstances as they existed at the time, having due regard to the position of the preceding vehicle and the traffic upon and conditions of the highway.

Plaintiffs must further establish, by a fair preponderance of the evidence, that the negligence of the

dh:mg 6

defendant was the proximate cause of the accident.

To constitute proximate cause, not only must the cause actually contribute to the result, but such a cause must not be a remote one. It is a cause which, in the natural and continuous sequence, unbroken by any efficient intervening cause, helps produce the injury and without which the accident would not have happened.

A fair preponderance of the evidence is no more than the greater weight of the evidence, and this weight is determined by the quality, not quantity, of the evidence. It has nothing to do with the number of witnesses called to testify on behalf of any party.

If the evidence is evenly balanced in your minds, then the plaintiffs have not sustained their burden of proof and your verdict must be for the defendant.

If you determine that the injury complained of was proximately caused by the negligence of Girdwood, then, and then only, will you consider the amount of money plaintiffs are entitled to receive to compensate them for the injuries they sustained.

In determining damages in a personal injury case, the law, insofar as possible, attempts to award a just and fair compensation for a loss which directly and

naturally flows from a wrong done by a defendant to a plaintiff. The damages awarded must be purely compensatory and neither inadequate nor excessive.

The damages should include such sums that you would find would compensate Thomas Chiarello for pain and suffering, for loss of earnings, and medical expenses which he has shown, by a fair preponderance of the evidence, was suffered as a result of this accident.

Pain and suffering shall include both pain and suffering in the past up to the present, and such pain and suffering as you believe from the evidence he is likely to experience in the future, taking into account the nature and extent of his disability.

If you believe that the pain and suffering will be permanent, you may take into consideration the life expectancy of the plaintiff.

The plaintiff is presently 39 years old and has a life expectancy of about 32 years.

Life expectancy is merely a statistical average and expresses what may be the reasonably expected number of years to which a person of a certain age may live.

You are entitled to find the lesser number of years if you believe that because of Mr. Chiarello's physical condition, unrelated to the accident, he may not be

dh:mg 8

expected to live for the entire 32 years.

Obviously, the amount to be awarded for pain and suffering and the nature of the injury cannot be determined with mathematical certainty.

However, the amount of the award must be based on fact and not on mere conjecture or speculation.

Under no circumstances are you justifed in making an award to a plaintiff simply because he may have been seriously injured, or from a feeling of sympathy, or a desire to give him something.

The only proof that's been presented to you for medical and hospital expenses incurred in connection with the treatment of the injuries attributable to the accident is a bill from St. Vincent's Medical Center in Richmond for $62.50

Loss of earnings falls into two categories: (1) loss of earnings to date, (2) future loss of income, if any, should you find the earning capacity of the plaintiff has been impaired either entirely or diminished in part.

One who has been injured by the negligence of another must make a reasonable attempt to minimize damages by resuming gainful employment as soon as he reasonably can.

dh:mg 9

As to loss of earnings, Thomas Chiarello has testified that at the time of the happening of the accident, he was earning approximately $16,000 a year, and that he has not been able to work since the date of the accident on June 30, 1972, and this is three and a half years; but as you have heard, he did receive his salary for the first six months from his company.

You may use this amount that he was earning at the time of the accident as some indication of his future loss of earnings.

If you find that his injuries attributable to the accident are permanent, and his future earnings will thereby be affected, you must consider, in arriving at the amount of damages you will award him for future loss of earnings, his age, which is 39, his physical condition at the time of the accident, the type of employment before the injuries, and his work expectancy, which is 26 years.

As I have already indicated to you, you may find his work expectancy is less than 26 years, which is when he will reach the age of 65, taking into consideration his physical condition aside from any limitations caused by the accident itself.

Plaintiff, Angela Chiarello, claims damages for what is called her loss of consortium. Consortium

is a concept that is more difficult to explain than to understand. Here, consortium means the aid, comfort and conjugal fellowship of the marital relationship. It includes the affection, warmth and emotional support of the relationship, as well as the sexual relationship between the spouses.

It is all the things that make a marriage different from a friendship, blended into a conceptual unity.

If you find, by a fair preponderance of the evidence, that Girdwood was negligent, that his negligence caused the accident, and that as a result Angela Chiarello has suffered a loss of her consortium, then you must find against Domenico Bus Service in an amount that will compensate Angela Chiarello for this loss.

Just as in the case of damages for pain and suffering, the amount to be recovered cannot be determined with mathematical precision. However, the amount awarded, if any, must be based on fact. You must not make an award to Angela Chiarello based on sympathy or a desire to give her something, but only on the basis of an actual loss that you find to have occurred, and on which you have placed a specific value.

As to the duration of the loss, should you find

it exists, you may consider possible improvements in the relationship of the spouses as well as the 32-year life expectancy of Thomas Chiarello.

You may find loss in the past as well as future loss of consortium.

On Wednesday we had a discussion about "the present value of the dollar," which is a recognition of the fact that a lump sum of money received today is worth more than the same amount of money paid in installments over a period of time.

This is so because a lump sum can be invested and earn interest over a period of years.

Usually the mathematical computations are left to the jury. However, counsel have agreed with the Court that you need not engage in this effort but need only answer the questions which will be submitted to you in writing before you retire to deliberate the issues.

The Court will make the necessary computations based on your answers to the questions.

In answering the question as to what the rate of interest should be, that rate should be one which can fairly be expected from reasonably safe investments made by a person of ordinary prudence who does not have particular financial skill or experience.

dh:mg 12

In answering the question as to what the possible rate of inflation may be in the future, the only proof before you was given by Professor Seplacki. He testified that a 6% rate of inflation could be ex-- pected in the future. This may be used as a guideline in arriving at the answer to the question, but the answer to the question is solely within your discretion.

In your search for the truth, you must use plain, everyday common sense. You must not be governed by sympathy, bias or prejudice.

You have seen the witnesses on the stand and observed their manner of giving testimony.

How did they impress you? Did they appear to be testifying frankly and candidly?

In determining what degree of credit you should give a witness' testimony, you may consider his conduct, his manner of testifying and his interest in the outcome of the litigation.

The plaintiffs, of course,are interested witnesses, as is Henry Girdwood, both on his own behalf and as an employee of Domenico Bus Service.

You may consider these facts in determining the weight and credibility of their testimony.

However, it does not necessarily follow that

because a person is interested in the result, he is not capable of telling a truthful version of an occurrence.

If you believe that a witness willfully testified falsely to any material fact, you may disregard his testimony altogether or you may accept such portion of his testimony as you believe worthy of credence.

What you accept or reject as credible testimony is for you to determine, but you may not go outside the evidence to speculate as to the facts.

You will recall that Mrs.Chiarello was asked about statements which she made prior to trial under oath.

An inconsistent statement made by a plaintiff prior to trial and under oath may be considered by you as affirmative proof of the facts contained therein, as well as impeaching her credibility on this trial.

Inconsistencies and contradictions appearing in the testimony may or may not be explainable; so, too, they may be willful or inadvertent, deliberate or innocent, major or minor.

It is for you to appraise the significance of any inconsistencies and contradictions in relation to the credibility of a witness.

Various hospital records have been introduced in evidence. The facts contained in them are evidence for you to consider. The credibility and the weight that you give to them is solely within your discretion.

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case.

One is direct evidence, such as the testimony of an eyewitness.

The other is indirect or circumstantial evidence. That is the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

Circumstantial evidence is the proof of facts from which the facts in issue may reasonably be inferred.

You may draw such inferences as reason and common sense lead you to draw from facts which you find to have been proven.

Circumstantial evidence is not on any different or lower plane than direct evidence. No greater degree of certainty is required of circumstantial evidence. The law simply requires that you find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

dh:mg 15

You have heard the testimony of doctors called on behalf of both parties. How do you, as laymen, determine the facts from medical testimony?

You are to act in exactly the same way that you would appraise and determine the credibility of an ordinary witness, as I have already outlined for you.

Ordinary witnesses are allowed to tell you only what they see, hear or experience. Experts, such as the physicians who were called, are permitted to also tell the jury their opinions by reason of their training and knowledge in their paritcular field.

As you well know, an opinion is something a witness forms in his own mind based on specific facts from which, using his judgment, training and experience, he draws certain conclusions.

Of course, if you don't believe the facts which form the basis of the expert's opinion, then his opinion is valueless; but otherwise, you will treat an expert's opinion as evidence which you have heard. You may accept his opinion or you may reject it, in whole or in part, and it is entirely up to you as to what you will do with it as testimony and what credibility you will give to it.

The only doctor who treated the plaintiff and who was called to testify in this trial is Dr. Spitz,

the general practitioner.

Mr. Chiarello failed to call any of the other doctors to whom he went for treatment and had first-hand knowledge of his condition, especially Dr. Leone, an orthopedist, and Dr. Gervin, a neurosurgeon, who treated him during the past two years.

You may draw such inferences as you believe appropriate from plaintiffs' failure to call such witnesses.

I have sought to avoid any comments which might suggest that I have personal views on the evidence. I have no views on the facts of this case and you are not to assume that I have any such views.

This charge is given to you solely to instruct you as to the law applicable to this case.

The actions of the judge during the trial in ruling upon motions or objections by counsel or in statements to counsel or in attempting to clearly set forth the law in these instructions are not to be taken by you as any indication of the determination of any of the issues of fact.

These matters, the actions of the Court, relate to procedure and law. You, and you alone, determine the facts.

dh:mg 16

There are six members of this jury and all of you must agree upon a verdict.

I would point out that no one should enter upon the deliberations in the jury room with such pride of opinion that he or she would refuse to change it if convinced by intelligent argument on the part of another juror or jurors that they are right.

However, you are not to do violence to your own well-founded opinion. You are entitled to that opinion. In other words, each of you must decide the case for himself or herself after thoroughly reviewing the evidence and exchanging views and deliberating with your fellow jurors.

If you should desire any of the exhibits, they will be sent to the jury room upon request.

If you want any of the testimony or any portion of this charge read, that can also be done upon your request.

This case is obviously an important one to the plaintiffs. It is equally important to the defendants. I am submitting it to you in complete confidence that you will comply with your oath as jurors and decide the case fairly and impartially,and without fear or favor.

If there are any exceptions to the charge, I will

dh:mq 17

take them in the robing room.

Mr. Schultz?

MR. SCHULTZ: Yes, sir, I have one objection.

(In the robing room)

THE COURT: Yes? Whatis your request?

MR. SCHULTZ: I thought it was an exception, your Honor.

THE COURT: Or exception.

MR. SCHULTZ: If your Honor please, at this time I respectfully except to that portion of your Honor's charge which dealt with the failure to call a witness.

As I understand the law in New York, which is controlling, and New Jersey, with relation to that portion of evidence, as I understand it, I'm entitled to a charge, and I request that you do charge, that if you find that Doctors Gervin and Leone were in a position to give relevant evidence in support of the plaintiff's claim and that the plaintiffs have offered no reasonable explanation for failing to call those two witnesses, your Honor, the jury may infer, if they deem it proper to do so, that the testimony of the uncalled doctors would not contradict the opposing evidence or would not support the plaintiffs' version of the case, and further, that the jury may draw the strongest inferences against the

plaintiff that the opposing evidence, with relation to the doctors' opinions, permits.

You may consider this in light of the plaintiff's failure to call these two doctors, Dr. Leone and Dr. Gervin.

THE COURT: I refuse to give such a charge on the facts of this case.

In the first place, the evidence, to the extent of any evidence at all, appears in hospital records.

Secondly, there was other medical proof available, and the type of charge you request is where the defendant had placed upon the stand a doctor with first-hand knowledge, not a consulting docotr.

That was not done, so you are not entitled to this charge.

MR. SCHULTZ: I respectfully except, your Honor.

THE COURT: You put on experts, consulting doctors. The plaintiff put on experts and consulting doctors. So, as I say, under the facts of the case here, you are not entitled to that. But you are entitled to what I gave because of the Coons case in the Second Circuit in 1973, which says that is the appropriate charge to give.

MR. LASSOFF: Your Honor, I have no exceptions.

dh:mg 19

I do have a request that you charge the appropriate New Jersey motor traffic regulations.

THE COURT: I refuse to do that because since you have been a lawyer in this case for two years, when you come in when I'm ready to charge a jury and request to charge, I won't undertake it.

You were told last November to have your charge in last week and you failed to do it.

I won't do it. I think the charge is adequate, in any event.

MR. LASSOFF: All right.

THE COURT: I think it is the most ill-prepared case I have come across. This is a perfect example of what has gone on through this entire trial.

(In open court)

THE COURT: Swear the marshal.

(One marshal duly sworn)

THE COURT: I suggest that the jurors be taken to lunch now and then come back and start your deliberations.

At this point, I'm awfully sorry, Miss Connell, but you no longer continue.

Would you take your hat and coat and leave the jury? Thank you very much.

(Alternate juror excused)

dh:mq 20

THE COURT: I have told you about these questions which will be submitted to you.

When you return from lunch, the clerk will give them to you and you can use them at that time.

Is one of the marshals here? Why don't you take the jury out. Miss Connell should be out of the room by now. Take them to lunch and then return.

(At 12:30 p.m., the jury retired to deliberate)

THE COURT: I assume if there are any calls for exhibits, counsel can agree among themselves as to what goes in?

MR. SCHULTZ: Yes. If your Honor please, I wanted to discuss that.

When Mr. Lassoff placed into evidence Dr. Baird's report, I thought that when I had seen it the first time that there was a reference to Insurance Company of North America on it. And when I looked at it, I didn't see it, but then I suddenly realized now that it is on the last page of the thing at the bottom.

So I respectfully--

THE COURT: You could work something out to take that out.

dh:mg 21

MF. SCHULTZ: I think it should be deleted or cut off.

THE COURT: Anything you agree upon is all right.

Here are the questions to be given to the jury when they return from lunch.

The clerk just informed me the marshal took their orders for lunch during the recess before the charge, so the lunch is being brought in.

So you better be back by 1:30.

MR. SCHULTZ: All right, your Honor.

(Luncheon recess)

hjl 220 610a

(At 2:20 p.m., the jury returned to the courtroom.)

THE CLERK: Ladies and gentlemen of the jury, please answer to your presence as I call your name.

(Jury polled - all present.)

THE CLERK: Madam Forelady, have you agreed upon a verdict?

THE FORELADY: Yes.

THE CLERK: Please stand.

How do you find?

THE FORELADY: We are not for the defendant. We're for the defendant.

THE COURT: Poll the jury.

THE CLERK: Members of the jury, please listen to your verdict as it stands recorded. You say you find for the defendant. Mrs Cohen, is that your verdict?

JUROR NO. 1: Yes.

THE CLERK: Mrs. Nugent, is that your verdict?

JUROR NO. 2: Yes.

THE CLERK: Mr. Hurley, is that your verdict?

JUROR NO. 3: It is.

THE CLERK: Mr. Vance, is that your verdict?

JUROR NO. 4: Yes.

THE CLERK: Miss Carmichael, is that your verdict?

JUROR NO. 5: Yes.

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THE CLERK: Mrs. Dierden, is that your verdict?

JUROR NO. 6: Yes.

THE CLERK: So say you all.

THE COURT: Ladies and gentlemen of the jury, you have listened to the testimony very carefully during the last three days, and the whole system of American justice is that you weigh the evidence carefully and reach a verdict as you see fit. You have done that and, therefore, discharged your duties as jurors. Are they excused now?

THE CLERK: Yes, your Honor, they are excused, their services are completed.

Thank you very much.

(Jury discharged.)

THE COURT: Any motions?

MR. LASSOFF: Yes, your Honor. Plaintiff moves to set the verdict aside on the grounds that it's contrary to law, contrary to fact, and contrary to the weight of credible evidence. The best evidence adduced by the defendant in this case showed that he couldn't possibly have stopped his bus under the speed he was going and the conditions he was proceeding under in time to avoid this accident. The law says that a bus or a car, any motor vehicle, must be under such control at all times as to avoid an accident. And it is clear from the best testimony of the evidence that the

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defendant produced that he could not have done this.

THE COURT: I will take papers on this motion in ten days.

MR. LASSOFF: Thank you, your Honor. May I also make a motion with regard to your Honor's refusal to grant my request to charge?

THE COURT: You were late in submitting them.

MR. LASSOFF: I can still make a motion, can I not?

THE COURT: You have made it inside.

MR. LASSOFF: May I list the specific statutes in the motion because they have not been mentioned anywhere in the trial record.

THE COURT: Did you submit your requests to charge to the clerk?

MR. LASSOFF: Yes.

THE COURT: Well, give them to him. Keep them in your file for the record.

Plaintiff shall serve its papers for a new trial, setting aside the verdict for a new trial, by January 26th, and the defendant shall file its answering papers by February 2nd.

All right.

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Thomas J. Chiarello (Resumed)	12 115	145 227	239	
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Angela Chiarello	250	262	264	
Dr. Lawrence Kaplan	265	300	312	
Les Seplaki	314	323	327	
Henry Girdwood	330			
Henry D. Girdwood	354	374		
Duke Barnett Baird	399	428		
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EXHIBIT INDEX

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Order—Judgment of Dismissal in Favor of Defendant, After First Trial.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THOMAS J. CHIARIELLO,

Plaintiff,

against

DOMENICO BUS SERVICE Inc. and HENRY GIRWOOD,

Defendants.

73 Civil 2962
75 Civil 1956—CMM)

The issues in the above entitled action having been brought on regularly for trial, before the Honorable Charles M. Metzner, United States District Judge, and a jury, on January 13, 14, 15 and 16, 1976, and the jury having returned a verdict in favor of the defendants, it is,

ORDERED, ADJUDGED and DECREED: That defendants Domenico Bus Service, Inc., and Henry Girwood, have judgment against plaintiff Thomas J. Chiariello, dismissing the complaint.

Dated: New York, N. Y.
January 21, 1976

RAYMOND F. BURGHARDT
Clerk

Plaintiff's Notice of Motion for Judgment Notwithstanding Jury's Verdict in Favor of Defendant, or For a New Trial.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THOMAS CHIARELLO,

Plaintiff,

against

DOMENICO BUS SERVICE, Inc. and HENRY GIRWOOD,

Defendant.

73 Civ. 2962
J. Metzner

Action #1

ANGELA CHIARELLO,

Plaintiff,

against

DOMENICO BUS SERVICE, Inc. and HENRY GIRWOOD,

Defendants.

75 Civ. 1956

Action #2

Plaintiff's Notice of Motion for Judgment Notwithstanding Jury's Verdict in Favor of Defendant, or For a New Trial

To:

Daniel J. Coughlin, Esq.
Attorney for Defendants
110 William Street
New York, New York 10038

Sirs:

Please take notice, that on the record, stenographer's trial minutes, exhibits in the action, and all papers and proceedings heretofore filed and had herein, pursuant to F. R. Civ. P. Rules 50 (b) and (c) and 59, and any other applicable Federal Rules of Civil Procedure, plaintiff, by his undersigned attorneys, hereby moves the Court (Metzner, J.) for judgment for the plaintiff notwithstanding the verdict returned herein on January 16, 1976, on the ground that the evidence conclusively proved that the defendant was negligent and the plaintiff was free from contributory negligence and plaintiff was entitled to a directed verdict herein or, alternatively, to vacate said verdict and any judgment entered herein and order a new trial on the ground that said verdict is contrary to law, contrary to fact and contrary to the weight of the credible evidence and was just plain wrong.

It is most strongly urged that unless this verdict is vacated, there would be perpetrated a gross miscarraige of justice as there is no credible evidence to support the jury verdict.

The only evidence as to liability produced at the trial was the testimony of the plaintiff, Thomas Chiarello, the deposition of the defendant, Henry Girdwood, and the testimony of said defendant.

Plaintiff's Notice of Motion for Judgment Notwithstanding Jury's Verdict in Favor of Defendant, or For a New Trial

PLAINTIFF'S TESTIMONY.

Plaintiff testified that he made a left turn to approach the bridge (5—numbers refer to stenographic pages); that there was a railroad trestle with a dip or underpass beneath; that when you came up out of the dip you had an unobstructed view and approach to the ramp (6); when he came out of the underpass he saw cars ahead of him with their taillights on and the car ahead of him was braking to a stop: he saw another car in front of that one just starting to go through a puddle of water (10).

The car ahead of him stopped ¾ of a car length before the puddle and plaintiff came to a stop ¾ of a car length behind that car (about 10 feet) (10-11).

After plaintiff's car came to a stop he looked into his rear-view mirror and saw the bus coming out of the dip and coming hard. Plaintiff braced himself and was struck in the rear (11). The bus travelled 100-150 feet from the point where it came out of the dip to where plaintiff was standing still (18). Neither plaintiff nor the car in front of him had any difficulty in stopping (19-20).

On cross examination plaintiff testified that the road was only one lane at the place of the accident (7). He was travelling 15-20 miles per hour when he first saw the brake lights of the car ahead of him (8).

DEFENDANT GIRDWOOD'S DEPOSITION.

On his deposition he testified that his bus was 8 feet wide (6—these numbers refer to pages in the deposition) and at the point where the accident occurred, the road was 25 feet wide (7). The accident occurred after the bus came out of a down-grade through a puddle (9-10). As

to the location of the accident with respect to the underpass or dip, he testified:

> "Q. How far had you gone beyond that dip when the accident occurred? A. Approximately 25 feet." (10)

He testified that before he entered the dip in the road the nearest car in front of him, plaintiff's car, was 75 feet in front of him (10). At this point there was only one lane of traffic being used (10-11).

He testified:

> "Q. When did you first notice the car in front of you start slowing or stopping if you noticed that? A. About 50 feet in front of me when I saw the car in front of him apply his lights first". (11)

He saw plaintiff travel 25 feet from the time he applied his brakes until he stopped and the accident occurred (11-12).

> "Q. How fast were you moving before you saw the other cars apply their brakes, apply their brake lights? A. About 25 miles an hour." (12)

When he saw the cars apply their brakes, he applied his also but not with full pressure because he had gone through water (12).

Defendant never changed lanes at any time nor did he attempt to.

> "Q. So at no point since you first saw the cars in front of you apply their brakes did you change lanes? A. No sir." (13)

He struck plaintiff's car straight on, his front bumper striking plaintiff's rear (13-14). At the point of impact he was going at 20 miles an hour and at that speed he

thought he could stop his bus in 30 feet on a dry road (14) and that on a wet road under the conditions prevailing at the time of the accident, going at that speed, it would take him approximately 50 feet to stop (14-15).

After the accident he was able to continue to operate the bus on its regular run (18).

DEFENDANT'S TESTIMONY.

At the trial defendant testified that he was a bus driver for over 9 years (2-3—numbers refer to stenographic trial minutes) and he drove that bus route about 2 years every day five days a week (8-9). His work day started at 6:00 A.M. and ended at 7:00 P.M. and at the time of the accident was on the last run to be completed at 7:00 P.M. (3). The entranceway to the bridge that he was on was 25 feet wide (5). He was going at a speed of 25-30 miles an hour before he came to a dip in the roadway under a railroad trestle; he reduced speed going down in the dip because he knew that a puddle of water would be there (21-22). This trestle was about 100 feet in width and had a pool of water 9 inches deep for a distance of about 25 feet (7, 8). Defendant further testified that he had driven through this area in rain before and it was "usually flooded" (8).

He testified that plaintiff's car was 75 feet in front of him in going down the underpass and he saw him go through the flooded area and followed him (11).

This time he placed the accident at 75-100 feet past the trestle (12).

He testified that when applying the brakes they operated properly though wet but the wheels locked and the bus wouldn't stop because of the wet roadway (15). After the accident both taillights on plaintiff's car were broken (18).

Plaintiff's Notice of Motion for Judgment Notwithstanding Jury's Verdict in Favor of Defendant, or For a New Trial

He was fully aware of the effect of weather on brakes (31) and testified:

> "Q. As a matter of fact as an employee of the Domenico Bus Service, Inc. do they give you certain instructions with regard to safety and operating buses in difficult weather conditions? A. Yes sir they do.
>
> Q. What were the instructions as of June 30, 1972? A. Not following close.
>
> Q. Not following close? A. Yes sir. (31-32).

At 20 miles per hour he travelled 30 feet per second (32-33). He claimed he had tried to steer into the curb and that his rear wheels hit the curb on the curve (36-37); that going at 20 miles an hour on dry pavement it would take him 50-60 feet to stop his bus and it would take 70 feet on a wet pavement (38, 39). He further testified that from the time he saw the brake lights go on it would take a second or a fraction of a second to transfer his foot from the accelerator to the brake (36).

DISCUSSION.

This is a very simple case complicated by conflicting versions given by defendant and the raising of false issues. There is no evidence of probative value showing defendant was free from negligence. To the contrary, all the evidence shows him to have been going too fast for the conditions prevailing; too close to the car ahead; and he failed to avoid the accident when he had a reasonable opportunity to do so. He didn't have his bus under control. His testimony is not believable and it flies in the face of the physical facts. Plaintiff was standing still and defendant's bus slammed into him, knocked him a distance of 10 feet into a car ahead, and injured him

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severely. Defendant admits there is no contributory negligence here. The bus came to a stop within 2 feet after hitting plaintiff's car. The roadway was wet, inclined and only one lane of traffic on it. It was 25 feet in width. Despite such width of the roadway the bus still didn't avoid striking plaintiff's car directly and squarely in the rear. The physical fact is that both taillights were smashed on plaintiff's car.

There was no attempt made by the bus driver to swerve despite this testimony to the contrary. Had he made such an attempt, at best he would not have hit the car squarely in the rear and he probably could have avoided striking the plaintiff altogether. Furthermore, he testified on his deposition that he made no attempt to swerve or avoid striking plaintiff's car.

To compound the careless behavior on the part of the bus driver and glaringly so, is his knowledge of every inch of the roadway in question. He had been a regular bus driver on this very route for over 2 years. He travelled this route 5 days a week. He knew the number of lanes of the road; at what point water accumulated; whether the drainage didn't function on the roadway; he knew the depth of the water which would accumulate; he knew where lanes merged; and where one would lose sight of a car ahead by reason of a turn in the road. He also knew the effect of wet pavement on the control he had of his bus and its braking capacities. He testified that at a given speed he knew he could stop within a certain distance when applying the brakes; he also knew that if the roadway was wet and in the condition it was in at the time of the accident, it would take him a greater distance to stop his bus. He admitted that he was instructed by his employer to keep a greater distance between his bus and the vehicle ahead of him if the roadway was wet. Knowing all these things, and even with the distances and speeds he testified to, he still ran into plaintiff's car.

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There was nothing unusual about the road, traffic, or condition of the highway that surprised him or he could not anticipate or had not experienced before. Obviously he did not have control of his bus and was too close and fast for prevailing conditions.

He claimed when he applied the brakes he skidded on the wet roadway, his wheels locking at 20 miles an hour. The story of such effect of the wet roadway is not true. The cars ahead of him managed to stop in the usual normal manner without skidding. Why didn't he? He said he was afraid to go around plaintiff because there was another car "hugging" his rear wheel. This phantom car, if it existed, managed to stop without mishap upon the happening of the accident. No one ran or skidded into the bus. The only way he could have skidded was by applying his brakes improperly and suddenly. Parenthetically, if defendant thought that there was another car to his rear trying to pass him in a single lane roadway, was the defendant continuing this excessive speed under the circumstances in order to beat out the car in the rear and was he so preoccupied with that that he failed to exercise such judgment as was necessary to avoid this accident?

It should also be noted that on his deposition the defendant testified he struck plaintiff at 20 miles per hour, that this accident occurred 25 feet from the underpass and if that is so, the bus driver came barreling through the underpass where there was a turn to the right and in an area where, as he puts it, he momentarily lost sight of the car ahead of him because of the turn and ran full tilt into plaintiff. Again, he knew of this turn in the roadway and the condition of the road and yet proceeded at this rate of speed which obviously invited the occurrence of the accident.

His story of trying to slow the bus by having the rear wheels strike the curb on the curve is not credible. He

did not have the time and room for that tricky maneuver. It is more likely that he did not negotiate the curve properly and struck the curb. He then sought to apply his brakes and struck plaintff full tilt.

The defendant also says that he did not apply his brakes fully because his "wheels locked at 20 miles an hour". But his brakes worked perfectly and after the accident he continued on and everything functioned normally. There was no sudden mechanical failure nor were his acts caused by any emergency.

In going through the puddle in the underpass, he assumed that the drum of the brakes got wet but that apparently did not prevent him from applying the brakes and to have the brakes function. The only meaning of the locking of the wheels was that he was going so fast for the road and traffic conditions prevailing that he thought he was skidding. In the exercise of reasonable care he should have anticipated such effect on his control of the bus. It should also be borne in mind however that he was going uphill too and he could steer and he had a 25 foot wide road with one lane of traffic only to contend with. He says the drum got wet because he assumed that it always does in going through any puddle, and it should also be noted that he started to skid at 20 miles an hour and slowed down to 9 miles an hour when he hit the plaintiff. Parenthetically, that is not true either, for in his examination before trial he stated that he was going 20 miles an hour when he slammed into the plaintiff, but that was when he placed the plaintiff 25 feet from the underpass. He now places him 75-100 feet past the underpass and so hits him with less speed. It should also be noted that on the deposition he testified 2 years ago that he was proceeding 25-30 miles an hour, whereas when he testified he attempted to reduce the speed itself.

All of this raises a question as to why did the defendant do it. Perhaps the reason could be found in the

testimony that he started his day driving this bus at 6:00 o'clock in the morning. It would end at 7:00 P.M. and this accident happened at 6:00 or 6:30 P.M. and he was on his last run. His haste in completing his run determined when he would go home.

A claim of an "unavoidable accident" does not justify his negligent acts. Based on mathematical computation of distances and speeds of the bus, even as he testifies to, he would be travelling too close to plaintiff's car and knowing the conditions of the roadway, caused this accident to occur. Once he was too close to the car ahead or going too fast for the distance between himself and the car ahead under the circumstances, it may very well be that the accident became unavoidable. For example, if a man sets fire carelessly to a house and then tries everything he can to put out the fire and is unsuccessful and the house burns down, it may be said that the burning down of a house was unavoidable but to begin with, it was his carelessness in setting fire to the house that caused this accident. He set in motion the chain of events that resulted in a loss. Likewise here, once this bus driver went too fast and too close to the car ahead, such carelessness caused the accident, depriving him of the capacity to avoid the accident. Such attempt to avoid an accident does not excuse or exculpate him from his negligence in placing himself and others on the roadway in that dangerous position.

On the deposition defendant testified that at 20 miles an hour his bus could stop at 30 feet and on a wet road it would take him approximately 50 feet. He said he was going 25 miles per hour when he applied his brakes. Proportionately, at 25 miles the bus could be stopped in 37½ feet on a dry road and 62½ feet on a wet road. Yet he testified that he was following plaintiff 50 feet away, a distance less than he required to stop.

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In this deposition defendant also stated plaintiff was 75 feet ahead of the bus when it entered the underpass and was only 50 feet ahead when they left the underpass so that within a distance of approximately 100 feet the bus gained 25 feet on plaintiff's car and defendant's bus was obviously going very much faster than the plaintiff and the rest of the traffic.

If one adds the distance travelled while moving one's foot from the gas pedal to the brake pedal to the 62½ foot distance necessary for braking, the defendant was clearly negligent in following too closely.

On the trial defendant testified to different figures which did not help him. He said there that he applied his brake when 60 feet away from plaintiff and was going at 20 miles an hour. Using the proportions as testified to on the deposition (30 feet stoppage on dry road and 50 feet on wet road) the stopping distance was approximately 100 feet. Thus defendant's testimony flies in the face of mathematical computation.

THIS COURT HAS THE DUTY AND POWER TO SEE THAT JUSTICE IS DONE.

The Judge's duty is essentially to see that there is no miscarriage of justice. If the evidence is not substantial and is legally insufficient to take the case to the jury, judgment must be granted.

On the motion for Judgment N.O.V. the Court should *consider all of the evidence,* not just that evidence which supports the non-mover's case—but in the light and with reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, the granting of the motion

is proper. *But the evidence opposed to the motion must be substantial.* In judging what is substantial, its quality and weight is considered. A mere scintilla of evidence is insufficient to present a question for the jury and there must be a conflict in *substantial* evidence to create a jury question. *Boeing Company v. Shipman* (C.A. 5th 1969) 411 F. 2d 365, and 5 Moore's Federal Practice Par. 50.02 (1) 2320-2330.

The Court of Appeals, Second Circuit cited the foregoing with approval in *Simblest v. Maynard,* 427 F. 2d 1. In that case there was a right angle collision between a car operated by plaintiff and a fire truck. The verdict was in plaintiff's favor and the trial judge granted Judgment N.O.V. in defendant's favor. Plaintiff testified that before entering the intersection his view was obstructed and when he entered the intersection he looked and saw the fire truck 12 feet away bearing down upon him; that there was no flashing red light on it and he heard no siren. The Circuit Court going through mathematical computations of rates of speeds and distances concluded that plaintiff had only a fraction of a second to observe the fire truck and that such fleeting observation did not support an inference that the light was not operating, "much less does it constitute competent direct evidence to that effect". Others testified to the fire engine's flashing red light. The Court stated that "Plaintiff's testimony that he did not see the fire engine's flashing red light, in the teeth of proven physical facts, we hold is tantamount to no proof at all on that issue.—the Court stated the question of the total absence of proof quickly merges into the question whether the proof adduced is so insignificant as to be treated as the equivalent of the absence of proof." (at page 6).

The Court also held that from the photograph it would appear that plaintiff's view was not completely obstructed. The Judgment N.O.V. was upheld.

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The duty of the Judge is to set aside a verdict and grant a new trial if he is of the opinion that the verdict is against the clear weight of the evidence, or is based on evidence that is false, or will result in a miscarriage of justice, even though there may be substatnial evidence which would prevent the direction of a verdict. *Aetna Casualty Surety Co. v. Yeats,* 122 F. 2d 350.

In the exercise of its discretion, the Court may consider the evidence as a whole and weigh it and if he thinks the jury was mistaken or that the verdict was wrong, although supported by some evidence, he should grant a new trial. Where circumstances lead the Trial Court to believe that a new trial would better serve the ends of justice, a motion should be granted in the proper exercise of discretion. Thus, in *Reyes v. Grace Line Inc.,* N. Y. 334 F. Supp. 1104 (S.D.N.Y. 1971), 1972 A.M.C. 826 at page 829, the Court described his reaction to a verdict as follows:

> "Over and above the matter already dealt with herein, the entire trial record justifies a new trial. We were taken aback (our judicial conscience jarred) when the verdict was announced. It appeared to us then, and further extensive examination and reflection supports our initial reaction, that the verdict on the issue of liability disregarded the complete factual picture presented. It has made us uneasy; we cannot get rid of the firm and unalterable conviction that the doing of justice makes a new trial imperative."

This quote describes the reaction of all those having knowledge of the facts in our case.

It should further be noted that defendant's attorney, Mr. Schultz requested a settlement discussion on the morning of the third day of the trial and brought in the

head of the Claims Department from his insurance company in New Jersey to settle this case. The Court sent deponent out to determine the minimum figure plaintiff would take in settlement of this case and the Judge, Mr. Schultz and the representatives of the insurance company were informed that the demand was $1,000,000. The Judge stated that he thought plaintiff's figure was a little high—in his opinion the case was worth $800,000. Mr. Schultz recommended the payment of $1,000,000 but was turned down by people he called "Puzzle Pushers" and they came back with an offer of only $350,000.00.

It can be seen clearly from settlement negotiations and the trial that those who were most intimately connected with this case were of the opinion that there was no real question of liability. A gross miscarriage of justice occurred and it would be wrong and unjust to permit this verdict to stand.

The jury in our case was asked to determine whether defendant operated his bus as the ordinary reasonably prudent driver would under the circumstances. None of the jurors had any experience operating long vehicles like buses and hence had no guidelines or equivalent standards to go by. Had the applicable Vehicle and Traffic Laws been included in the charge to the jury, they at least would have had more adequate guidance in their deliberation. The reason for the Trial Judge's refusal to charge the statute had nothing to do with the merits of the case, nor was there any question of the applicability of the law. Plaintiffs' attorney did not intend being contumacious or disrespectful. In any event any possible misdeeds by said attorney should not be the basis for a denial of justice and a fair trial to plaintiffs.

Plaintiff's Notice of Motion for Judgment Notwithstanding Jury's Verdict in Favor of Defendant, or For a New Trial

The net effect has been a horrendous one which this Court has the power and the duty to correct. The motions under Rules 50 b, c and 59 should be granted.

Dated: New York, New York
January 26, 1976.

Yours, etc.

MARTIN LASSOFF
Attorney for Plaintiffs
Office & P. O. Address
160 Broadway
New York, New York 10038

To:

MacCarthy, Schultz & Mulholland, Esqs.,
Trial Counsel to Daniel J. Coughlin
Attorney for Defendants in Action No. 1
and Defendant Domenico Bus Service, Inc.
in Action No. 2.

Affidavit of John A. Schultz in Opposition to Plaintiffs' Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THOMAS CHIARELLO,

Plaintiff,

against

DOMENICO BUS SERVICE, Inc. and HENRY GIRDWOOD,

Defendants.

73 Civ. 2962 Judge Metsner

Action Number 1

ANGELA CHIARELLO,

Plaintiff.

against

DOMENICO BUS SERVICE, Inc. and HENRY GIRDWOOD,

Defendants.

75 Civ. 1956

Action Number 2

State of New York,
County of New York, ss:

JOHN A. SCHULTZ, being duly sworn, deposes and states as follows:

I am Trial Counsel to Daniel J. Coughlin, attorney for the defendants in Action Number 1 and defendant Do-

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menico Bus Service, Inc. in Action Number 2, and submit this affidavit in opposition to the within motion.

The plaintiffs, through their attorney, now move this Court for judgment for the plaintiff notwithstanding the verdict, or in the alternative for an order vacating the verdict or judgment for the defendant and granting a new trial.

The plaintiffs' aforesaid prayer for relief is predicated on the ground that there is no question of liability as to the defendants herein. The moving papers are completely silent as to the issue whether the negligence of the defendants was the proximate cause of the injuries complained of.

Prior to the commencement of the trial herein your deponent submitted a memorandum of law, a copy of which was served upon the attorney for the plaintiffs, and Point II of said memorandum indicated that the plaintiffs must prove that the defendants' negligence was the proximate cause of the accident complained of and of the injuries allegedly sustained. The Court, in its charge, stated at Page 6 of the transcript of said charge as follows:

> "If you determine that the injury complained of was proximately caused by the negligence of Girdwood, then, and then only, will you consider the amount of money plaintiffs are entitled to receive to compensate them for the injuries they sustained."

It is patent that one of the factual issues to be considered by the jury was whether or not the negligence of the defendants was the proximate cause of the injuries complained of.

It is uncontroverted that on June 30, 1972 there was a collision involving the rear of the car driven by the plaintiff Thomas Chiarello and the front of a bus driven by Henry Girdwood and owned by Domenico Bus Service,

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Inc. There was however an issue as to whether the aforesaid collision was occasioned as the result of the negligence of the defendant Henry Girdwood. The plaintiff, on cross-examination, stated that there was a dip underneath a railroad trestle and that there was no water underneath said railroad trestle even though said point underneath the railroad trestle was the lowest point in the roadway. (See Page DH:MG 6 and Page 1 MMS of Chiarello cross-examination).

The defendant Henry Girdwood on direct examination testified in substance that shortly prior to the happening of the occurrence complained of there was a heavy rainstorm. There was a dip in the roadway underneath a railroad trestle which accommodated 10 railroad tracks and said trestle was approximately 100 feet wide. The roadway under the trestle was level and after passing under the trestle going towards the bridge the roadway commenced an upgrade. The area under the trestle was flooded and in fact said area usually was flooded after rainstorms. Mr. Girdwood stated that the dip in the roadway or the area under the trestle was the lowest point in said roadway. Mr. Girdwood testified that the occurrence took place after the bus that he was operating passed through the flooded area at a point approximately 75 to 100 feet beyond the trestle. The vehicle operated by Mr. Chiarello was approximately 75 to 60 feet ahead of the bus and said vehicle operated by Mr. Chiarello came to a stop after the vehicle ahead of it stopped and then commenced moving. At the time that Mr. Chiarello brought his vehicle to a stop the bus operated by Mr. Girdwood was proceeding at approximately 20 miles per hour and although the brakes were applied within a fraction of a second after observing the signal lights, the bus did not stop owing to the wet roadway and the fact

that the brakes were wet. At the time of the impact the bus was proceeding at a speed of approximately 7 to 8 miles per hour. (See Pages 5 through 15—Girdwood direct). On cross-examination Mr. Girdwood testified in substance that he reduced his speed while proceeding downgrade towards the flooded area. (See Page 21—Girdwood cross). It was elicited on cross-examination that while driving through the flooded area, water would reach the brake drums. (See Page 23—Girdwood cross). Mr. Girdwood further testified that the bus was proceeding at a speed of approximately 20 miles per hour after coming out of the flooded area and that the closest car in front of him was 75 feet distant. (See Pages 32-33—Girdwood cross). Mr. Girdwood also stated that he attempted to steer his vehicle to the curb and that the wheels in fact did strike the curb in an effort to avoid the plaintiff's vehicle. (See Page 36—Girdwood cross). After traversing the flooded area Mr. Girdwood observed a car to his left rear which prevented him from moving to his left. (See Page 12—Girdwood direct).

The plaintiffs' attorney read into evidence the deposition of the defendant Henry Girdwood and at said examination before trial Mr. Girdwood testified in substance that he was moving approximately 25 miles per hour and applied his brakes lightly when he observed the signal lights of the vehicle ahead owing to the fact that he had gone through water. At the deposition Mr. Girdwood also testified that he did not change lanes owing to the fact that there was a slippery condition and a vehicle was hugging his left rear wheel. (See Page 13 of Girdwood deposition).

It is patent from the foregoing that there is a sharp dispute and issue of fact as to whether or not there was a collection of water underneath the trestle which

was the lowest point in the roadway. The plaintiff testified that there was no water at that location and the defendant Henry Girdwood stated that there was a flooded condition and that based on his knowledge this area was usually flooded. Mr. Girdwood testified as to the operation of the bus under the conditions then and there prevailing and it was the contention of the defendants that Mr. Girdwood acted as a reasonably prudent man would act under said circumstances. In fact, the Court charged the jury that in order for the plaintiffs to recover, they must prove by a fair preponderance of the evidence that Henry Girdwood was negligent and that said negligence was the proximate cause of the accident. (See Page 5 of the Court's charge). The issue as to whether the defendant Henry Girdwood was negligent was submitted to the jury as a question of fact and the jury returned a verdict in favor of the defendant and implicit in that verdict is the finding that he was not negligent. The evidence adduced at the trial and set forth above clearly indicates that there was a question of fact as to whether or not the defendant Henry Girdwood was negligent in the operation of the bus.

There was also an issue of fact as to whether the defendant's negligence was the proximate cause of the plaintiff's injuries.

The plaintiff, on cross-examination, testified that subsequent to the accident he walked back to the bus and then drove his vehicle as it was being pushed. (See Pages 14, 16 of Chiarello cross). Mr. Chiarello also testified that he had received blows to his neck and back while playing football at a private academy at a high school level. (See Page 20—Chiarello cross). On subsequent cross-examination the plaintiff testified that in

his occupation prior to the occurrence he lifted heavy objects, was required to slide doors of freight cars and that the objects weighed from 50 to 60 pounds and from 1 pound to 100 pounds. (See Chiarello cross MS 4 and 5).

It was elicited on cross-examination that Mr. Chiarello used a pool located in the rear of his house daily and that he was treated by Doctors Leone and Gervin and that he was sent to Doctor Arthur Friedman by his prior lawyer and trial lawyer (See Pages MS 10 of cross-examination).

The plaintiffs produced 3 medical witnesses, Doctor Spitz, Doctor Kaplan and Doctor Friedman. Doctor Spitz was the initial treating doctor who was a general practioner and admittedly a friend of the plaintiff's father-in-law. Doctor Spitz took no X-rays, reviewed no X-rays and examined the plaintiff on many occasions. The doctor admitted that the plaintiff was obese and hyper-tensive and it was his opinion that these factors would diminish the life expectancy of the plaintiff.

Doctor Friedman examined the plaintiff for the purposes of litigation and admittedly his services were obtained through the intercession of the plaintiff's attorneys. Doctor Friedman did not treat the plaintiff at any time and saw him on 2 occasions.

Doctor Kaplan, a neurologist-psychiatrist testified on cross-examination that the operative record indicated that there was scarring and adhesions at the L4 area. On cross-examination Doctor Kaplan admitted that it was a possibility that the scarring and adhesions predated the occurrence complained of. Doctor Kaplan also stated on cross-examination that the complaints of the plaintiff did not follow and were not in accordance with the anatomical distribution of nerves. Doctor Kaplan further

stated that he could find no organic nerve defect nor could he find any organic nerve involvement which would cause impotency. It is obvious that through the plaintiff and the plaintiff's own experts an issue of fact was raised as to the injuries and whether or not the said injuries arose as the result of the occurrence complained of.

Mr. Girdwood testified on direct examination that Mr. Chiarello, subsequent to the occurrence, got out of his car and bent down to open the trunk and also bent down to get his keys from the car. There was no indication of injury and no claim of injury made at the scene. In fact, the plaintiff told the police officers that he was all right. (See Pages 16 and 17 of Girdwood direct). From the foregoing an issue of fact was created as to whether the plaintiff sustained injuries as a result of the occurrence complained of.

The defendant produced 2 medical witnesses, Doctor Baird an orthopedist and Doctor Gould a neurologist.

Doctor Baird examined the plaintiff Thomas Chiarello in February of 1975 in Florida and it was the opinion of Doctor Baird that there was no reason for the plaintiff to use a cane and that he could perform certain work.

Doctor Gould conducted an examination of the plaintiff Thomas Chiarello on January 12, 1976 and stated that he could find no neurological involvement or defect. In fact Doctor Gould concurred with the plaintiff's expert Doctor Kaplan in that the plaintiff's complaints did not follow the anatomical distribution of the nerve patterns. Doctor Gould pointed out to the Court and jury that the plaintiff's complaints were inconsistent in that he complained of lack of sensation on the top of his hand yet could feel sensation on the palm of his hand although both areas were served by the same nerves. Doctor

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Gould also stated that the complaint of the plaintiff that his grip in his right hand was weakened was not consistent with the fact that he supported his weight with a cane while gripping the can with his right hand. It is significant to note that the plaintiff weighed approximately 260 pounds. In this regard Doctor Baird also indicated to the Court and jury that the plaintiff was using the cane improperly in that if the right lower appendage were affected the cane should be carried on the left side.

A review of the foregoing points up the fact that there was in truth an issue as to whether the plaintiff sustained the injuries complained of and further whether said injuries were proximately caused by the negligence of the defendant. The issue as to whether the injuries were sustained and proximately caused by the negligence of the defendant was submitted to the jury and implicit in their verdict was a finding that the injuries were not proximately caused by the negligence of the defendant.

The credibility of the plaintiffs, defendant and medical experts was also an issue to be considered and the issue of credibility is one for the jury.

The attorney for the plaintiffs alludes to settlement negotiations and his statements pertaining thereto are wholly inaccurate in that your deponent did not refer to anyone as a puzzle-pusher nor did your deponent recommend a figure of One Million Dollars. To place upon the record settlement negotiations which were not part of the record and were not submitted to the jury is unprofessional to say the least.

It is the opinion of your deponent that to set forth a recommendation of settlement made by the Trial Judge is also improper. It is significant to indicate that settlement discussions were held prior to the testimony of the

defendants' medical experts. The Court in considering the matter did not have before it the testimony of the defendants' medical experts nor was the Court aware of the quality of that testimony. The fact that settlement negotiations were undertaken and that a recommendation of settlement was made is irrelevant to the issue at hand. What is relevant is the fact that there were questions of fact and that these questions of fact were submitted to the jury. The attorney for the plaintiff moved for a directed verdict and that motion was denied by the Trial Court on the basis that there were issues of fact. It has long been held that issues of fact are to be determined by a jury.

A memorandum of law is attached hereto and it is respectfully requested that said memorandum be considered.

WHEREFORE, in light of the fact that there were clearly issues of fact presented by the evidence herein as to the negligence of the defendant and whether said negligence, if any, was the proximate cause of the injuries claimed, and further that said issues were considered by the jury pursuant to the Court's charge it is respectfully requested that the plaintiffs' prayer for relief be denied in its entirety and that the verdict of the jury be permitted to stand.

(Sworn to by John A. Schultz, January 29, 1976.)

Reply Affidavit of Martin Lassoff in Support of Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THOMAS J. CHIARELLO,

Plaintiff,

against

DOMENICO BUS SERVICE Inc. and HENRY GIRWOOD,

Defendants.

73 Civil 2962
(J. Metzner)

Action Number 1

ANGELA CHIARELLO,

Plaintiff,

against

DOMENICO BUS SERVICE Inc. and HENRY GIRWOOD,

Defendants.

75 Civil 1956

Action Number 2

State of New York,
County of New York, ss:

MARTIN LASSOFF, being duly sworn, deposes and says: That I am an attorney-at-law, duly licensed to practice

and represent plaintiff in Action Number 1 and plaintiff in Action Number 2 herein.

Defendants' opposition to the Motion places emphasis not on any question of liability, for obvious reasons, but claims that the Jury found no causal relationship between the accident and the injuries claimed.

Nothing was said of the medical evidence in the moving papers herein because it was inconceivable that any one could possibly conclude that plaintiff suffered no injury whatsoever in this accident. Not only was the front and rear of plaintiff's car damaged and the radiator broken, but the very seat he was sitting on was broken.

Each of the doctors who testified found plaintiff suffering with severe physical conditions, which disabled him. Plaintiff's doctors testified to causal relationship between the accident and the injuries he suffered and the conditions he now has as a result of such accident and injuries. The doctors called as Witnesses by defendant were not even asked to express an opinion as to causal relationship, and so did not testify with respect thereto. They did, however, testify to plaintiff's present poor physical condition but they sought to convey the thought that as a result of the accident, plaintiff suffered an injury which is not quite as severe as plaintiff's witnesses said he had.

Therefore, the competent medical testimony in the case, uncontradicted, could not possibly give rise to a conclusion of no proximate cause, as claimed by the defendant. The testimony, as referred to in the Affidavit in Opposition, is not accurate and does not set forth such testimony correctly—but even if it were true, that does not justify a verdict for the defendant because of no proximate cause. Any possible disagreement between medical witnesses, as to nature and extent of an injury, might affect the size of a verdict but, as long as there is *any* injury proximately caused by the accident, the Jury must find for the plaintiff as long as the accident was caused by the negligence of the defendant.

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Defendant here bases his claim of no resulting injury on the defendant-operator's testimony that he saw no indication of injury. (Actually, defendant testified that following the accident, plaintiff appeared "shaken" and "white." (P. 43 Girdwood Cross.)

Since when is a bus driver's impression considered competent medical testimony?

Before this accident, plaintiff was a productive, steadily-working individual. Following this accident, he became, is and will be unable to function as a provider, husband and father.

If the reason for the verdict was the Jury's failure to find any injury proximately caused by the accident, the Motion to set aside the verdict and for Judgment N.O.V. must be granted.

MARTIN LASSOFF

Sworn to before me this
3rd day of February, 1976
MYRA GREENE
Notary Public, State of New York
No. 31-6652858
Qualified in New York County
Commission Expires March 30, 1976

Opinion and Order by Metzner, D. J., Granting Plaintiffs' Motion to Set Aside Jury's Verdict.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THOMAS CHIARELLO,

Plaintiff,

against

DOMENICO BUS SERVICE, Inc. and HENRY GIRDWOOD,

Defendants.

73 Civ. 2962

ANGELA CHIARELLO,

Plaintiff,

against

DOMENICO BUS SERVICE, Inc. and HENRY GIRDWOOD,

Defendants.

75 Civ. 1956

METZNER, D. J.:

Plaintiffs move to set aside a jury verdict in favor of defendants in this personal injury action.

Defendant Girdwood's testimony is that he had just come out of a dip in the road under a railroad trestle, which dip contained a pool of water 9 inches deep and 25 feet wide, at a speed of 20 miles per hour, when he saw the brakelights of plaintiff's car go on. The car had been in his vision for some time prior thereto. He

applied his brakes when he was 60-75 feet from the car and hit plaintiff's car which was standing still at the time. The bus was going 7-8 miles per hour when it hit the car.

When he applied the brakes, the bus started to slide. "The wheels locked and the vehicle would not stop on account of the wet roadway."

Girdwood said that on a dry roadway, his bus could stop within 50-60 feet. It would take 70 feet to stop the bus on a wet roadway.

Defendants took no exception to plaintiffs' claim that a car going 20 miles per hour travels 30 feet a second. On cross examination Girdwood seemed to retreat from his statement that he applied the brakes when the car was 60-75 feet ahead of him, to a version that when he saw the brakelights go on, the car was 60-75 feet ahead of him. If the latter be true, then a fraction of a second would be taken up in transferring the driver's foot from the accelerator to the brakes. A half a second would cause a difference of 15 feet and a full second would cause a difference of 30 feet.

Obviously, because of the narrow tolerances, we cannot with accuracy plot what happened. Giving the defendants the most liberal interpretation, the whole situation was just too close, in view of the conditions of the roadway at the time of the happening of the accident and the speed at which the driver admits he was going. The jury's verdict is predicated on the failure of plaintiffs to show that the bus driver was negligent. This finding is against the weight of the evidence and therefore must be set aside.

So ordered.

Dated: New York, N. Y.
February 12, 1976

CHARLES M. METZNER
U. S. D. J.

Plaintiff's Notice of Motion to Amend Pre-Trial Order.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THOMAS J. CHIARELLO,

Plaintiff,

against

DOMENICO BUS SERVICE INC. and HENRY GIRWOOD,

Defendants.

73 Civil 2962
(J. Metzner)

SIRS:

Please Take Notice that the plaintiff herein hereby moves to amend the Pre-Trial Order heretofore filed herein, to list the following additional Witnesses and Exhibits:

WITNESSES:

Payroll Department—Universal Terminal & Stevedoring Corp. and/or Universal Maritime Service Corp. With records of annual increases in pay for Pier Superintendents and, in particular the Pier Superintendent who replaced Thomas J. Chiarello as Pier Superintendent in Bayonne, New Jersey.

Ingemar A. Larsen

Port of New York Authority Police Officer, J. Hutchings

Mechanic from A to Z Auto Body Works

Plaintiff's Notice of Motion to Amend Pre-Trial Order

EXHIBITS:

Any and all X-rays taken by:

Dr. Arthur Friedman
Dr. Benjamin E. Lanier
Dr. Lawrence I. Kaplan
Dr. Samuel P. Leone
Dr. Stephen Z. Gervin

Hospital Record of Memorial Hospital, Hollywood, Florida, for admission in July, 1975, and/or X-rays, Myelograms and other test procedures performed at said Hospital.

Any and all X-rays taken at any hospital in which plaintiff was treated and/or admitted.

Authenticated hospital bills of:

Golden Isles Hospital
Memorial Hospital (Hollywood, Florida)
Richmond Memorial Hospital (Richmond, Virginia)
Richmond Memorial Hospital (Staten Island, New York)
St. Vincent's Memorial Center of Richmond (Staten Island, New York).

Authenticated medical bills of:

Dr. Stephen Z. Gervin
Dr. Samuel P. Leone

Motor Vehicle Accident Report of The Port of New York Authority

Plaintiff's Notice of Motion to Amend Pre-Trial Order

Paid bill of A to Z Auto Body Works.

Dated: N. Y., February 19, 1976.

Yours, etc.

MARTIN LASSOFF
Attorney for Plaintiff
Office & P. O. Address
160 Broadway
New York, N. Y. 10038
Tel. No.: BA 7-1350

To:

Daniel J. Coughlin, Esq.
Attorney for Defendants
110 William Street
New York, N. Y. 10038

Defendants' Objection to Plaintiffs' Motion to Amend Pre-Trial Order.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THOMAS CHIARELLO,

Plaintiff,

against

DOMENICO BUS SERVICE, Inc. and HENRY GIRDWOOD,

Defendants.

Action Number 1

73 Civ. 2962
Judge Metzner

ANGELA CHIARELLO,

Plaintiff,

against

DOMENICO BUS SERVICE, Inc. and HENRY GIRDWOOD,

Defendants.

Action Number 2

75 Civ. 1956

SIRS:

Please Take Notice that the defendants hereby object to and oppose the plaintiffs' motion to amend the pre-

Defendants' Objection to Plaintiffs' Motion to Amend Pre-Trial Order

trial order heretofore filed herein as being untimely and prejudicial to the rights of the defendants.

In the event that the plaintiffs' motion is granted the defendants hereby request an opportunity to have a physician examine whatever X-rays, hospital records, reports of myelograms or other tests procedures which plaintiffs intend to introduce into evidence, and further request that said physician be permitted to testify on the trial.

Please Take Notice that the defendants hereby move to amend paragraph 6 of the pre-trial order heretofore filed as follows:

The issues to be tried are as follows:

1. Were the defendants negligent?

2. Was the plaintiff Thomas J. Chiarello contributorily negligent?

3. What is the pecuniary value of the plaintiffs' damages?

Dated: New York, New York
February 25, 1976.

Yours etc.,

MacCarthy, Schultz & Mulholland
By: John A. Schultz
Trial Counsel for Daniel J. Coughlin
Attorney for Defendants in Action Number 1 and Defendant Domenico Bus Service, Inc. in Action Number 2
Office and P. O. Address
225 Broadway
New York, New York 10007

Defendants' Objection to Plaintiffs' Motion to Amend Pre-Trial Order

To:

Martin Lassoff, Esq.
Attorney for Plaintiffs
160 Broadway
New York, New York 10038

Daniel J. Coughlin, Esq.
Attorney for Defendants in Action Number 1
and Defendant Domenico Bus Service, Inc.
in Action Number 2
Office and P. O. Address
110 William Street
New York, New York 10038

Defendants' Notice of Motion to Amend Pre-Trial Order.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THOMAS CHIARELLO,

Plaintiff,

against

DOMENICO BUS SERVICE, Inc. and HENRY GIRDWOOD,

Defendants.

Action Number 1

73 Civ. 2962
Judge Metzner

ANGELA CHIARELLO,

Plaintiff,

against

DOMENICO BUS SERVICE, Inc. and HENRY GIRDWOOD,

Defendants.

Action Number 2

75 Civ. 1956

SIR:

Please Take Notice that the defendants herein hereby move to amend the Pre-Trial Order heretofore filed to list the following additional witness and exhibits:

Defendants' Notice of Motion to Amend Pre-Trial Order

Witness:

Mr. J. Teeney

Exhibits:

Appraisal report made by Certified Damage Appraisals *re* plaintiffs' motor vehicle 1972 Plymouth;

4 photos.

Dated: New York, New York
March 2, 1976.

Yours, etc.

JOHN A. SCHULTZ
MacCarthy, Schultz & Mulholland
Trial Counsel to:
Daniel J. Coughlin
Attorney for Defendants in Action Number 1 and Defendant Domenico Bus Service, Inc. in Action Number 2
Office and P. O. Address
225 Broadway
New York, New York 10007

To:

Martin Lassoff
Attorney for Plaintiffs
Office and P. O. Address
160 Broadway
New York, New York 10038

Defendants' Notice of Motion to Have Second Trial Heard Before Another District Judge.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THOMAS CHIARELLO,

Plaintiff,

against

DOMENICO BUS SERVICE, Inc. and HENRY GIRDWOOD,

Defendants.

Action Number 1

73 Civ. 2962
Judge Metzner

ANGELA CHIARELLO,

Plaintiff,

against

DOMENICO BUS SERVICE, Inc. and HENRY GIRDWOOD,

Defendants.

Action Number 2

75 Civ. 1956

Please Take Notice that on all papers and proceedings heretofore filed and had herein, on the record of the trial of the above captioned action, on the motion papers filed in support of and in opposition to the motion for a new

Defendants' Notice of Motion to Have Second Trial Heard Before Another District Judge

trial, on the decision of this Court dated February 12, 1976 and on the annexed affidavit of John A. Schultz, sworn to the 24th day of February, 1976, the undersigned will make application in the United States District Court for the Southern District of New York, Foley Square, New York, New York on the 1st day of March, 1976 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel may be heard before Honorable Charles M. Metzner, Room 2201 that the second trial of the above captioned case be held before another District Judge.

Dated: New York, New York
February 24, 1976

Yours etc.,

MacCarthy, Schultz & Mulholland
By: John A. Schultz
Trial Counsel for Daniel J. Coughlin
Attorney for Defendants in Action Number 1 and Defendant Domenico Bus Service, Inc. in Action Number 2
Office and P. O. Address
225 Broadway
New York, New York 10007

To:

Martin Lassoff, Esq.
Attorney for Plaintiffs
160 Broadway
New York, New York 10038

Daniel J. Coughlin, Esq.
Attorney for Defendants in Action Number 1 and Defendant Domenico Bus Service, Inc. in Action Number 2

Affidavit of John A. Schultz in Support of Defendants' Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THOMAS CHIARELLO,

Plaintiff,

against

DOMENICO BUS SERVICE, Inc. and HENRY GIRDWOOD,

Defendants.

Action Number 1

73 Civ. 2962
Judge Metzner

ANGELA CHIARELLO,

Plaintiff,

against

DOMENICO BUS SERVICE, Inc. and HENRY GIRDWOOD,

Defendants.

Action Number 2

75 Civ. 1956

Affidavit of John A. Schultz in Support of Defendants' Motion

State of New York,
County of New York, ss:

JOHN A. SCHULTZ, being duly sworn, deposes and states as follows:

I am Trial Counsel to Daniel J. Coughlin, Esq., attorney for the defendants in Action Number 1 and defendant Domenico Bus Service, Inc. in Action Number 2.

Your deponent submits this affidavit with utmost respect for this Court having tried the above entitled action before Your Honor for four days during January 1976. Your deponent also submits this affidavit with grave concern whether, in view of the Court's decision granting a new trial, the defendant will have the same opportunity of prevailing that they would have if their case were tried before a Court which had not already set aside a jury verdict in favor of the defendants.

During the trial of the above entitled personal injury action, both questions of liability and damages were submitted as questions of fact for the jury and the Court did charge the jury: "Of course, if you find that Girdwood was not negligent in the operation of his bus, then neither defendant is liable to the plaintiffs." In its verdict for the defendants, the jury, often referred to as "the conscience of the community" found that neither defendant was liable to the plaintiffs. After trial the plaintiffs moved for judgment notwithstanding the verdict or for a new trial. In its decision granting a new trial the Court said "the jury's verdict is predicated on the failure of plaintiffs to show that the bus driver was negligent. This finding is against the weight of the evidence and therefore must be set aside."

Affidavit of John A. Schultz in Support of Defendants' Motion

It is respectfully submitted that although evidence in a second trial may differ as to injuries and damages (plaintiffs have served a notice dated February 19, 1976 to amend their pre-trial order to list additional witnesses and exhibits), the evidence with respect to liability will be virtually the same. It would appear therefore that since this Court has already ruled that one jury's finding was against the weight of the evidence, similar evidence with respect to liability in a second trial before the same Court could not possibly result in a final judgment in favor of the defendants. It is for this reason that your deponent most respectfully urges that, in the interest of justice, the new trial of this action proceed before another Jurist.

WHEREFORE your deponent respectfully asks that this application be in all respects granted and that the new trial of the above entitled action proceed before another Judge of this Court.

(Sworn to by John A. Schultz, February 24, 1976.)

Order Denying Defendants' Motion to Have Trial Heard Before Another Judge.

THOMAS CHIARELLO

v.

DOMENICO BUS SERVICE, Inc., *et al.*
73 Civ. 2962

ANGELA CHIARELLO

v.

DOMENICO BUS SERVICE, Inc., *et al.*
75 Civ. 1956

Counsel for defendant was notified personally on February 18, 1976 that the retrial of this matter would proceed on March 3, 1976. He has filed a motion on February 24 returnable March 1, 1976, requesting the court to excuse itself. The court has advanced the return date of the motion simply because it did not want uncertainty as to the trial date to continue to the last minute. Witnesses coming from Florida will appear to testify.

The fact that the court has set aside a verdict as contrary to the evidence is not a legal basis for disqualification.

Motion denied. The trial shall proceed as scheduled. So ordered.

Dated: February 25, 1976

CHARLES M. METZNER
U. S. D. J.

TRANSCRIPT (SECOND TRIAL).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS J. CHIARELLO and ANGELA CHIARELLO, Plaintiffs,	:	
vs.	:	73 Civ. 2962 75 Civ. 1956
DOMENICO BUS SERVICE, INC., and HENRY GIRDWOOD, Defendants.	:	

New York, New York
March 3, 1976 - 2:00 p.m.

BEFORE:

HON. CHARLES M. METZNER,

District Judge
And a Jury

APPEARANCES:

MARTIN LASSOFF, ESQ.,
Attorney for Plaintiffs
160 Broadway
New York, New York

MC CARTHY, SCHULTZ & MULHOLLAND, ESQS.,
Attorneys for Defendants
110 William Street
New York, New York
BY: JOHN SCHULTZ, ESQ., of Counsel

THE CLERK: Thomas J. Chiarello versus Domenico Bus Service. Is the plaintiff ready?

MR. LASSOFF: Plaintiff ready.

THE CLERK: Defendant ready?

MR. SCHULTZ: Defendant ready.

THE CLERK: Both sides ready.

Will the jurors please rise and raise your right hand.

(Panel of prospective jurors sworn)

(A jury of six was duly impaneled and sworn.)

(One alternate juror was duly impaneled and sworn.)

THE COURT: We will have a short recess. The clerk will take you to the jury room where you can leave your clothes.

(Recess)

THE COURT: You may open.

MR. LASSOFF: Thank you, your Honor.

May it please the Court -

MR. SCHULTZ: May I respectfully request, your Honor, that the openings be recorded.

THE COURT: All right.

MR. LASSOFF: Mr. Lanier, ladies and gentlemen of the jury:

At this time I intend to give you a framework of

what I intend to prove in this case. I think by now from the little you have heard you must realize that this is a claim for an injury which resulted from a bus striking a car. This accident happened on June 30, 1972, and it happened on an access road to the Bayonne Bridge coming back from Bayonne, New Jersey, to Staten Island, where the plaintiff lives.

Plaintiff worked in Bayonne, New Jersey, as a terminal superintendent for Universal Terminal and Stevedoring Company at the Bayonne Military Ocean Terminal which is a pier -- more than a pier, a complex that the government runs and it particularly ran at that time for its military cargo.

The accident happened between 6:00 and 6:30 p.m. My client was coming home from work and he was driving his motor vehicle, which was a 1972 Plymouth Scamp.

Prior to the accident and at the time he left work there had been one of our famous New York summer thundershowers which had stopped some point before he reached this road, I would say some five or six blocks before he reached this access road to the bridge.

When you get to the access road to the bridge there is a light. My client doesn't remember if he had to stop for the light or he was permitted to make a left turn

without stopping, and he got on this road.

About 100 or more feet from the left turn to get on the road there was a railroad trestle which is quite large, quite wide, maybe 70 to a hundred feet wide, and past the railroad trestle you come up out of a dip and you approach the Bayonne Bridge. This accident happened somewhere between 100 and 150 feet past the dip before the bridge had been reached.

Now, as I told you, there was a heavy rainshower prior to this accident and as my client was driving along he went through this area under the trestle in which there was a dip in the road with drainage facilities in there, and he came up out of the dip. While he was still in the dip he could see the two cars in front of him braking. About 150 feet past the trestle there was a pool or puddle of water and these two cars were stopping so they could go through this puddle of water slowly. As my client came out of the dip he noticed this bus all the way back on the road. As he was still in the dip coming up out of it, he noticed the car in front of him apply its brake lights. My client took his foot off the accelerator and came to a slow and gradual stop three-quarters of a car length behind the car immediately in front of him. The car two cars ahead of him was proceeding slowly through this pool of water.

As my client applied his brakes to come to this stop, he saw this bus roaring through this dip. He was stopped for about a second when the bus came roaring out of the dip. My client looked to see if there was anywhere he could go. Since there was a car stopped immediately in front of him and this was a one-lane highway, there was nothing he could do. He looked back. The bus was still coming hard. He braced himself and he was smashed. When the bus hit the car he was hit so hard that the front seat of the car, the driver's seat, this is a two-door car, collapsed and he was thrown backwards on his back. The car itself was propelled forward striking the car stopped in front of plaintiff's car some ten feet ahead and pierced the radiator of his car. When plaintiff's car was slammed into the car in front, he was shot forward, catapulted, his head hit the visor and he remained draped over the steering wheel.

Incidentally, as we will show you, there was no problem with the second car in front of the plaintiff, the first car in front of the plaintiff or any cars behind the bus making a safe and proper stop. It is our claim that this bus driver and this bus company, and this is a large bus company, Domenico Bus Company -- you may have seen their buses around --

MR. SCHULTZ: If your Honor please, at this time

I will respectfully object to that.

THE COURT: Overruled.

MR. LASSOFF: -- were negligent in that they followed too closely and that they drove at too fast a rate of speed to stop their vehicle especially in view of the fact that admittedly the roadway was wet. And their driver claims that prior to the place where this accident occurred he had gone through a pool of water some nine inches deep by 25 feet wide underneath this railroad trestle. My client says there was no such pool of water, there was excellent drainage there, there was nothing blocking the drains and the roadway under the trestle was just wet as the rest of the highway was.

But knowing this, knowing that the roadway is wet, this driver nonetheless drove his bus at such a rate of speed that he could not stop his vehicle without smacking into the plaintiff.

Now, after the accident my client remained seated in his car for awhile. The bus driver came over to him, asked him how he felt, he was advised that he was terribly shaken. After some time the driver of the car in front and my client went into the bus to exchange license information and wait for the Port Authority Police and the Bayonne Police to arrive. They eventually did arrive and my client's car,

which was not operable because the radiator of the car had been pierced when it was pushed into the car in front, was pushed across the bridge by a Port Authority Police car with rubber bumpers. My client steered the car across the bridge, hanging on to the steering wheel because there was no support for his back. He was asked if he wanted medical attention. He said, "No, I want to go home."

Following the accident he came under the care of a Dr. L. Jackson Spitz, a doctor in Brooklyn, New York, who saw him Monday. His family doctor in Staten Island, and the plaintiff lives in Staten Island, was on vacation. He saw Dr. Spitz I think Monday and Wednesday, and then was advised to go see his family doctor, who was due back. He saw his family doctor, Dr. Rothman, who sent him to an orthopedist, a man by the name of Dr. Urs. Dr. Urs commenced a course of treatment both in his office and at the Staten Island St. Vincent Hospital in Staten Island consisting of physiotherapy and traction. My client went back I believe to Dr. Spitz in August or September for treatments for impotency he claimed as a result of this accident. Dr. Urs and several other doctors, I think a Dr. Moreno, referred my client to a neurosurgeon by the name of Dr. Leventhal, a neurologist by the name of Dr. Frank, electromyographic studies were performed and my client was supposed to enter

I believe the St. Vincent Hospital in Staten Island for a myelogram in December or early January of 1972. At that time there was a flue epidemic in Staten Island and in the city and there were no beds and nobody was being admitted for anything except emergency status. So my client went down to a hospital in Richmond, Virginia, called Richmond Memorial Hospital, where he was examined by internists, by orthopedists, by neurosurgeons and a myelogram was performed and the myelogram revealed he had a herniated disc in his lumbar spine.

He came back to Staten Island where he lived, he came under the care of Dr. Spitz, who treated him until, as you will hear, for reasons of health he moved to Florida in August of '73, and during that period of time he was referred to an orthopedic surgeon by Dr. Spitz, a Dr. Benjamin Lanier, I believe, and by his then attorney, in May of 1972, to another orthopedic surgeon, a Dr. Friedman. In August of 1973, as I said to you, my client permanently moved to Florida, sold his house in Staten Island and moved to Florida and purchased a house there which was not ready when he moved there, he stayed with his father for four months, and came under the care of an orthopedic surgeon in Florida, a Dr. Samuel Leone, who will be here to testify.

Dr. Leone in turn referred him to a neurosurgeon by the name of Dr. Stephen Gervin who saw the plaintiff on

three occasions prior to admitting him to a hospital called the Golden Isles Hospital in Hallandale, Florida, I believe, December of '73, at which point an operation was performed on my client's spine and the herniated disc was removed.

My client continued under the care of Dr. Gervin and Dr. Leone thereafter and while for a short period of time the pain radiating down his leg improved it came back again. In an effort to stop the pain he was given a machine, prescribed a machine, called a transcutaneous stimulator which in some way affects the passage of pain waves from the brain to the spine. He got some temporary relief. Then the machine didn't work. He was sent to a psychiatrist and he was then again admitted to another hospital in Florida by Dr. Gervin. I believe that is the Memorial Hospital. I forget the town in Florida, but it's another town in Florida where something like a Lushka rhizotomy or facet rhizotomy was done. The plaintiff will tell you the purpose. The purpose was to burn out the nerves in the spine so that there would be no pain, and after the operation the plaintiff did not have pain in his legs, he still had severe pains in his back. He again continued under the care of Dr. Gervin and Dr. Leone. The pain in the back began to come back and come back and come back and come back. In July of 1975 he was again admitted to this Memorial Hospital where another

myelogram was performed and, as you will hear from two doctors who will testify as to the results of that myelogram, there is still a problem in the spine with relation to the disc but these doctors do not believe that further surgery will help and that my client will have to live with this pain. You will hear a word perhaps you have never heard before and it will be throughout this case. The word is intractable pain. You will hear a definition of intractable pain being something that medicine cannot affect. He will have to live with that for the rest of his life. I believe Mr. Chiarello is 37 years old now. At the time of this accident, as I told you, he was employed as a terminal superintendent for a stevedoring company. We have subpoenaed that stevedoring company's records to show you that a man having the same job now and at the time that Mr. Chiarello did and, incidentally, at the time of this accident Mr. Chiarello's records will show he was earning about $16,000 a year, would now be earning at least $22,000 a year.

We will have for you hospital bills, medical testimony as to the fair and reasonable value of the services rendered to Mr. Chiarello, and we will prove to you that ever since this accident Mr. Chiarello has not been able to work and will never be able to do any work of any substance the rest of his life.

Incidentally, one thing I must say, that for six months after the accident he did receive his full basic pay from his employer, and after that he was terminated because, obviously, nobody could carry anybody for the rest of their life.

This is a case where you are going to be called upon by me at the close of the evidence to compensate Mr. Chiarello with an enormous -- an enormous -- sum of money.

Mrs. Chiarello is a co-plaintiff in this case. We are going to show you that as a result of this accident she has lost the services and society of her husband, that her life has been changed, that Mr. Chiarello's relationship with his children has been changed, that Mr. Chiarello has been impotent ever since this accident, that Mr. Chiarello, due to pain and due to the pressures of this accident, has been seriously suicidal, that the medicines that he needs have been taken out of his control and placed under lock and key. It's a terrible case, it really is. You are going to have to decide it. I ask that you pay careful attention to what everybody says. There are going to be a lot of doctors here, a lot of doctors. You listen to them. Thank you.

MR. SCHULTZ: If the Court please, ladies and gentlemen of the jury, this is a case that arose on June 30, 1972,

at about six or six-thirty in the evening. There had been a thunderstorm and the roadways were wet. A bus owned by Domenico was being operated by a man by the name of Henry Girdwood who resides in New Jersey. He was driving this bus and he was intending to go over the Bayonne Bridge.

The access road or the ramp or the way to the Bayonne Bridge at that point went downhill and there was a railroad trestle of about ten tracks wide. On the other side of the trestle was an uphill grade. Mr. Girdwood was operating this bus somewheres in the vicinity of 20, 25 miles an hour, 30 miles an hour, somewhere in that vicinity. He went down into this trestle, dip under the trestle, there was a vehicle on his left, at his left rear, he went through the puddle, somewheres around 75 feet in front of him the plaintiff's car came to a stop. Mr. Girdwood applied his brakes after going through a puddle of about nine inches deep of water, the back of the bus came into contact with the curbing. It is our contention that there was a contact with the vehicle in front of him. He did all that he could do, at least that's what we hope to prove, under the circumstances. This was an occurrence that took place, it is our contention, without fault. We hope to show this to you.

We also hope to show to you, and, of course, we are at a slight disadvantage because we don't know exactly what

the plaintiff will prove at this time. I don't know what they will prove because the statements that were just made to you, just as my statements are, are what we intend to prove.

We intend to show you that after the accident other than the fact that the plaintiff appeared to be shaken there were no visible signs of injury. We further hope to show to you that there is a dispute in some way as to the medical findings. The plaintiff was examined by two doctors in behalf of the defendants and there is a dispute as to the nature of some of the injuries and the findings. All of this, of course, will come in due time.

At this juncture all we can ask of you is to please sit back, observe these witnesses and, as the Court has requested of you, do not make a decision until you hear all of the evidence from both sides. Briefly, that's what the defendant's position is as I have just outlined to you. This was an occurrence that took place without fault. At the end of this case again it will be my duty and privilege to come to you and review the evidence with you to assist you in reaching a verdict. So until then I thank you for your kind attention and I will see you at the end of the whole case. Thank you.

MR. LASSOFF: Is there some sort of an easel in the

courtroom I can use?

MR. SCHULTZ: May I respectfully request at this time that we have an in-camera hearing, please, in chambers?

THE COURT: We'll be right back.

(In the robing room)

MR. SCHULTZ: If the Court please, the attorney for the plaintiff served a notice wherein he stated that he was going to move to amend the pretrial order so as to bring in additional witnesses and other doctors that were not utilized in the first trial and that he was going to use X-rays that were not used at the first trial.

We filed an objection to this.

THE COURT: I don't have it.

MR. LASSOFF: I believe, your Honor, the objection was just filed maybe two days ago. I served that notice to amend, your Honor, on the date your decision was called to my attention along with the letter stating how long I would need for trial, along with my requests to charge.

MR. SCHULTZ: If your Honor please, for the record, counsel is not correct. We filed and served these objections on February 25th.

THE COURT: I have requests to charge, I have a memorandum of law received from you on February 27th.

MR. SCHULTZ: I have this marked. There is no

question that it was served and filed.

MR. LASSOFF: I do not deny it was served, your Honor. I did receive a copy of it.

May I point out for the record, your Honor --

THE COURT: Yes.

MR. LASSOFF: -- that there are no new people that wouldn't be common knowledge. There is a Port Authority police officer who, obviously, was known to everybody from the time of the accident, the Port Authority Police record which is known to everybody from the time of the accident, the inspection of the vehicle, and I want to point out to your Honor that my client was insured by the Insurance Company of North America, which is the same defendant and the insurance company for the bus driver in this case. I believe that I also ought to put in a hospital record for June of 1975 which was offered in evidence at the last case and the myelograms which were in evidence in the last case and the X-rays of any doctor in this case. There is no attempt to introduce any new evidence of any kind. All of these records, including payroll records, are known to the defendants to exist since the inception of this lawsuit.

THE COURT: What is your objection, Mr. Schultz?

MR. SCHULTZ: If your Honor please, I have a copy of the objections here and the affidavit of service. First

of all, as I see it, he wants to put into evidence all of these X-rays. We have never had an opportunity to examine those X-rays or have a radiologist look at them. The hospital record of Hollywood, Florida, if your Honor please, we don't have a copy of that record. That was offered at the prior trial but was excluded because his pretrial order only ran until May and this was an admission in July. We never got this.

We have not had an opportunity to examine that. If your Honor please, we did file an objection and it was served on February 25th and it was filed. I don't know what happened to it. I have a copy here which I would like to have marked and I think counsel for the plaintiff has admitted before the Court that he received it.

THE COURT: The only question is whether the notice to amend which was served on you by mail on February 19th and docketed in this court on February 20th is timely.

MR. SCHULTZ: First of all, your Honor, that is part of my objection. I list in the objection that it is prejudicial and that we haven't had an opportunity to examine these items and I did file this objection and I did make it and I made my objection --

THE COURT: I am going to the merits. You are arguing as to whether you properly answered it or not. What

is your objection to this payroll department of Universal Terminal and Universal Maritime Service? I am taking it on its merits now. What is your objection to the first one?

MR. SCHULTZ: If your Honor please, I don't know what's in them. I don't know what is in them. I have never seen them. I haven't had an opportunity to examine them. I haven't had an opportunity to do discovery proceeding on them. I don't know what's in them.

THE COURT: Where are they?

MR. LASSOFF: They are under subpoena.

THE COURT: Where are they?

MR. LASSOFF: At Universal.

THE COURT: Bring them over the first thing in the morning and show them to the defendant.

MR. LASSOFF: Yes.

THE COURT: What is your objection to Ingmar R. Larsen?

MR. LASSOFF: He is the driver in front of our car, your Honor.

THE COURT: I think that's probably excludable. It is a little late to have him go chasing to find the guy to interview him.

MR. LASSOFF: It has been on the police blotter

since the date of the accident.

THE COURT: You never thought to put him on until this late date. I sustain the objection as to Larsen.

What about the Port Authority Police officer? He is the fellow who went to the car at the time of the accident.

MR. LASSOFF: Yes.

THE COURT: That fellow you know?

MR. SCHULTZ: I didn't know about it. It doesn't make any difference. The point is, if your Honor please, here we have had a trial and now he moves to amend. We haven't had any discovery proceedings on this.

THE COURT: I sustained as to Larsen. I see no reason why not to allow him to have Hutchings. The mechanic from the A & S Auto Body Works is what, to prove the damage to the car?

MR. LASSOFF: At one time during the last trial Mr. Schultz had made an objection or wanted to make an offer of proof that the front seat of the car was not broken, and I showed your Honor the Port of Authority Police reports.

THE COURT: Are you going to make that claim in this trial, Mr. Schultz?

MR. SCHULTZ: Yes, your Honor. I filed a notice to amend my pretrial order in order to produce a mechanic and a man who inspected the car.

THE COURT: Then I will allow him to produce his mechanic. Incidentally, I don't have a copy of your amendment to amend the pretrial order.

MR. LASSOFF: Your Honor, that was just served yesterday at 12:40 p.m.

THE COURT: I don't have that.

MR. SCHULTZ: It was filed yesterday, Judge. I would like to put on the record why.

THE COURT: I will take the merits. We are not going into delay. If you want to produce your man, which I will let you do, he is allowed to produce his.

MR. SCHULTZ: These are mechanics.

THE COURT: He is talking about a mechanic?

MR. SCHULTZ: If your Honor please, it was not until the last trial we knew there was a claim of a broken seat.

THE COURT: Mr. Schultz, I am allowing you to produce your mechanic on your amendment to the pretrial order. I will allow him to produce his mechanic on his amendment to the pretrial order.

X-rays taken by Friedman.

MR. LASSOFF: That is the doctor who testified at the last trial, your Honor.

THE COURT: You didn't have those X-rays?

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MR. SCHULTZ: No, we never examined them. We never had an opportunity to examine them.

THE COURT: Did you produce them for the last trial?

MR. LASSOFF: The doctor examined before he testified at the last trial, including the myelogram.

THE COURT: Answer my question.

MR. LASSOFF: Yes, your Honor.

THE COURT: When did you produce the X-ray to the defendant?

MR. LASSOFF: At the trial. Their doctor looked at them.

THE COURT: These are the X-rays your doctor looked at at the last trial?

MR. SCHULTZ: I don't remember that, Judge. I don't know. I don't know whether they -- they certainly weren't produced in sufficient time to examine them in an attempt to rebut them. If they came into evidence at the last trial, I don't remember whether my doctor looked at his X-rays or not. I don't know. Certainly Lanier and Kaplan and Leone and Gervin's X-rays were not here, your Honor.

MR. LASSOFF: Dr. Kaplan's were here.

THE COURT: Kaplan's were. I remember that.

MR. SCHULTZ: I don't remember. I just don't know,

gw/lf

Judge.

MR. LASSOFF: And I believe the only X-rays Dr. Gervin has --

THE COURT: What X-rays do you want to bring in that were not furnished to the defendant pursuant to what I must assume was some order along the line that you had to produce all this for them before the last trial?

MR. LASSOFF: There is no order with regard to witnesses or exhibits in this case, your Honor, except the pretrial order. The defendant has never asked for any medical exchange of information whatsoever. I still do not have a report from their examining doctor, Dr. Gould.

THE COURT: Stop the defense to the offense. I am worrying about your obligation. We will get to his obligation next.

MR. LASSOFF: All that I expect to put into evidence, your Honor, are the X-rays taken by Dr. Friedman, who had them at the last trial; Dr. Kaplan, who had them at the last trial; the myelograms, which are special X-rays which were in court at the last trial; and I don't know if Doctor -- the doctor from Florida, Dr. Leone, is even bringing X-rays. I put it down there in case he is. I am not trying to get any X-rays in that weren't fully known to everybody.

THE COURT: I want you at 9:30 tomorrow morning to

meet Mr. Schultz here in this courtroom with the list of the X-rays that you intend to bring in under this so he can find out whether they were available at the last trial or not.

MR. LASSOFF: All right, your Honor. I have all the X-rays. I don't know what Dr. Leone is bringing. He is arriving from Florida 11:30 tomorrow morning and I don't know what he has with him. With that exception, as soon as he comes I will give it to him, but I don't know what Dr. Leone has or doesn't have.

MR. SCHULTZ: If your Honor please, it says here any and all X-rays taken at any hospital in which the plaintiff was treated and/or admitted. It seems to me the defendants have a right to look at these before trial, not at the time of trial, to rebut them.

THE COURT: Are these X-rays we never saw before?

MR. LASSOFF: No, they are all part of the hospital records which the defendant has been given authorization to examine in every case.

MR. SCHULTZ: We are talking about X-rays.

MR. LASSOFF: You have an authorization to examine the hospital record.

MR. SCHULTZ: The hospital is in Florida. How do you get X-rays?

MR. LASSOFF: You had a doctor examine the plaintiff

in Florida and we gave him authorization to examine all records.

THE COURT: If you had that authorization --

MR. SCHULTZ: Judge, I don't know about that. I had Dr. Baird here. Whether or not these X-rays he wants to offer now were made available, I don't know.

THE COURT: I can't help that. If you don't know it, I don't know it.

MR. SCHULTZ: I know one thing, your Honor. At this time, at this late date, to do it at the second trial is prejudicial.

THE COURT: Not if he gave you authorization in connection with the medical you took before trial. If you didn't avail yourself of it that's not his fault nor the Court's fault.

The authenticated hospital bills.

MR. LASSOFF: These we didn't have before, your Honor. I had to send someone down to Florida to get them authenticated. I said hospital records and bills in the original pretrial order. I put it down so they would know there would be no claim of surprise. It is in the original pretrial order.

THE COURT: Check the original pretrial order, Mr. Schultz.

MR. SCHULTZ: I have that.

THE COURT: Authenticated medical bills of Gervin. Gervin is going to testify, isn't he?

MR. LASSOFF: Leone will. I believe Dr. Leone is the assistant on the operation and can testify to the fair and reasonable value of Dr. Gervin's services. He is an orthopedic surgeon and he did assist on the operation. He is listed in the operative report.

THE COURT: You give me a case on it to read. Motor vehicle report. I assume you have that, Mr. Schultz. I can't believe you came in to try the case without the accident report.

MR. SCHULTZ: I don't know as I have the one from the Port of New York Authority. That's why --

THE COURT: Get it.

MR. SCHULTZ: That's why I mentioned about the cop.

THE COURT: Get it.

Let's go out with the witnesses. I have ruled.

(In open court)

T H O M A S J. C H I A R E L L O, the plaintiff, being first duly sworn, testified as follows:

THE COURT: You may proceed.

MR. LASSOFF: Thank you, your Honor.

DIRECT EXAMINATION

gw/lf Chiarello-Direct 25

BY MR. LASSOFF:

Q Mr. Chiarello, do you remember the 30th day of June, 1972?

A Yes, sir, I do.

Q Would you keep your voice up, please?

A Yes, sir, I do.

Q Did you meet with an accident on that day?

A Yes, sir, I did.

Q Can you tell me where the accident occurred?

A On the approach ramp to the Bayonne Bridge from the New Jersey side.

Q Where were you coming from at the time this accident occurred?

A Military Ocean Terminal in Bayonne.

Q And what were you doing there?

A I worked there for the contracting stevedore.

Q And who was that?

A Universal Terminal Stevedores.

Q In what capacity did you work there?

A I was a terminal superintendent.

Q Now, can you tell us about what time that accident occurred?

A Around between six and six-thirty.

Q Now --

THE COURT: In the afternoon?

THE WITNESS: In the evening, yes, sir.

Q -- from the Bayonne Ocean Military Terminal until the access road the Bayonne Bridge is?

A Approximately ten minutes by car.

Q And at the time you left work on June 30, 1972, can you tell us what the condition of the weather was?

A Yes, sir. When I left work there was a thunderstorm, a summertime thunderstorm, a heavy rain.

Q As you continued from the pier or terminal towards the Bayonne Bridge, did there come a time when this rain stopped?

A Yes, sir, there did.

Q Can you tell me how far were you away from the access road to the Bayonne Bridge when the rain stopped?

A About five or six blocks prior to that access road we came out of the thunderstorm.

Q Coming from the Bayonne Military Ocean Terminal to the access road to the Bayonne Bridge, can you tell us how you do that?

A Yes, sir. You come out of the terminal, take one or two side streets for a couple of blocks and then you get on a main thoroughfare that heads towards the Bayonne Bridge. After just a couple of side streets and turns, it

is one continuous road on towards the Bayonne Bridge.

Q Does there come a time when you have to make a turn to get onto this access road to the Bayonne Bridge?

A Yes, sir, there is.

Q At the place where you have to make this turn, is there a traffic light?

A Yes, sir, there is.

Q Do you recollect on the day of the accident at the time you made the turn whether you had to stop for a traffic light or not?

A No, sir, I couldn't honestly say whether the light was green or red. I don't know.

Q In any event, you did make this left turn?

A It's a left, but if you understand, it's like only a one-third left. It's not a complete sharp left. It's a one-third left to get onto that access road.

Q Now, at the time you got on this access road, were there vehicles in front of you?

A When I made the left turn after the light, sir?

Q Yes.

A Yes, sir, there were.

Q How far in front of you were there any vehicles?

A I would say a good hundred feet. They were down just going into the dip.

Q At the time you made this turn, were there any vehicles immediately behind you?

A Not immediately, sir. They were back a ways.

Q When you got on this access road to the Bayonne Bridge, would you tell us what speed you were proceeding?

A Approximately -- I would say approximately fifteen to twenty miles an hour.

Q Incidentally, on this access road to the Bayonne Bridge, was there a sign with regard to speed limitations?

A Yes, sir.

Q And what did that sign state?

A That access road happened to be twenty miles per hour.

Q What was the condition of the roadway as you drove from the Military Ocean Terminal onto the access road to the Bayonne Bridge?

A Well -

Q I am just talking about weather now.

A It's broad. You say from the Ocean Terminal to the Bayonne Bridge. Part of the way was done in rain and then about five or six blocks before that we were on a wet roadway. It was not raining any more, the roadway was just wet.

Q How many cars were immediately in front of your

vehicle a distance of some, I believe you said, 100 feet --

A Yes, sir, 100 feet.

Q -- at the time you started to drive on this roadway?

A On the access road when I made that left, two vehicles, sir.

Q As you were driving along that access roadway, did there come a point where you noticed something about the operation of the vehicles in front of you?

A Yes, sir.

Q Can you tell us where you were with reference to the access roadway when you noticed something with reference to the operation of the vehicles in front of you?

A Yes, sir. In the dip in the right-hand lane.

Q You say a dip. Is there some structure covering that dip in the roadway?

A Yes, sir, there is a railroad trestle over it.

Q Is that a single trestle or a double trestle?

A I don't know. I know it's quite wide. The trestle is quite wide at that point. It could be single, it could be double. I know it is quite wide at that point.

Q All right. As you drive on the access roadway, before you get to the area where this railroad trestle is, is the road straight, is it uphill or is it downhill?

A It's a downgrade, sir.

Q Now, the roadway underneath the railroad trestle, would you tell us what that looked like?

A Yes. Just as you are coming down the grade and you get to the first part of the railroad trestle the road dips down to go under the trestle. You go under the trestle and the road comes back up and then has a slight upgrade heading towards the approach way.

Q All right. What, if anything, did you notice about the operation of the vehicles in front of you when you say you noticed a change in their operation?

A They put on their brake lights, sir. They were stopping.

Q How far in front of you was the car immediately in front of you at the time you noticed its operation?

A The first time I saw his brake lights go on, I would say 75 feet in front of me.

Q When you saw that occur, what did you do?

A Eased off the accelerator. It's normal when you see brake lights go on --

MR. SCHULTZ: Objection, your Honor. I move to strike it.

THE COURT: Sustained. He is not asking what is normal. He asked what you did at the time.

THE WITNESS: Yes, sir. I eased off the accelerator.

Q What did you do after that?

A I proceeded up to the car in front of me, which had stopped, and I stopped approximately ten, twelve feet behind him.

Q At the place where this car stopped in front of you, did you notice anything with regard to the condition of the roadway?

A Yes, sir. Not the car in front of me but the car in front of him was proceeding through a nice size puddle in the road.

Q When you say a nice size puddle, how did you know there was a puddle there?

A Well, the car that was proceeding that had stopped but now had started to proceed through it had the water coming up from around his wheels, and when I did stop I could see the puddle was from one side of the road to the other and the water was coming up from around his wheels.

Q At some point before you brought your car to a stop behind this car immediately in front of you, did you see a bus behind you?

A Yes, I did, sir.

Q Can you tell us where you were when you saw the bus?

A I was out from under the trestle and I was getting ready to stop when I looked up into my rear view mirror and

I saw the bus enter the dip.

THE COURT: How far from the trestle were you when you saw the bus?

THE WITNESS: About 75 feet, sir, beyond the trestle.

Q All right. Now, at the time of this accident was the car in front of you stopped or moving?

A The last time I saw him he was stopped, sir.

Q Did you at any time see the bus again prior to the accident from the time you saw him enter the dip?

A Yes, sir, I did.

Q When did you see him for the next time?

A When I had completely stopped. I looked back up into my rear view mirror and I saw him coming out of the dip very, very fast and hard. He was coming hard at me.

Q What did you do at that time?

A I looked back to see if there was any way I could go, whether I could get my car off to the left or to the right of the car in front of me, but it was impossible because on the left there is a low concrete retaining wall that separates the down traffic off of the bridge from the single lane going up onto the bridge. On the right-hand side there is a high curb and there was just no place to go, sir.

THE COURT: Is this a one-lane road?

THE WITNESS: At the point of the accident, sir, just

prior to there there are two lanes, but one lane -- the left lane leaves you, it makes a left turn after a stop. There is only one lane going up onto the bridge, the right-hand side lane.

THE COURT: That is the lane you were in?

THE WITNESS: Yes. There is a big sign, "Bridge Traffic Lane Only."

THE COURT: All right.

Q What did you do after looking forward towards the roadway in front of you before the accident happened?

A After I looked to see if I could find some place to go and I couldn't, I braced myself because I knew it was coming.

MR. SCHULTZ: Objection, your Honor. Move to strike it.

A I braced myself.

Q Did you look back and see the bus still coming at that time?

A Yes, sir, I did.

Q And how was he coming at that time?

A Hard and fast, very hard.

Q Now, did this bus and your car ever come in contact?

A Yes, sir, they did.

Q And when they did, tell us what that contact felt

like.

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

A The bus hit me in the rear, flush in the rear. I was forced backwards against the back of the seat. The seat snapped. The safety lock on the seat snapped, letting the back of the seat fall flat, and I fell flat with it. The force of his hitting me drove me into the back of the car that was still in front of me. When I hit the car in front of me I was propelled upwards into the visor just above the window and draped over the steering wheel and that's what I grabbed onto, like that (indicating), and jammed both feet onto the brakes again to stop the car.

Q Had your car moved of its own accord from the time you first saw this car coming out of the dip until the time the accident happened?

A No, sir, it hadn't. I was stopped dead until he hit me.

Q How long had you been stopped dead from the time you first saw this bus entering the dip until the time the accident happened?

A Three, four seconds, five seconds, something like that.

Q Did you observe the car in front of you coming to

a stop before this accident happened?

A Yes, sir.

Q Did it swerve or move in any direction from the time its brake lights went on until the time it came to a full stop?

A No, sir, it was stopped.

Q Did you observe the car in front of that car come to a stop before this accident happened?

A Yes, sir, I did.

Q Did that car move or swerve or change direction in any way from the time you first saw the car until it stopped?

A No, sir.

Q And then started again?

A No, sir, he did not.

Q Did you, yourself, when you took your feet off the accelerator and gradually came to a stop --

MR. SCHULTZ: Objection as to form, your Honor.

THE COURT: Sustained.

Q In bringing your vehicle to a stop, what, if any, difficulty did you have?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Sustained. Did he have any difficulty?

Q Did you have any difficulty in stopping your car?

A No, sir.

gw/lf Chiarello-Direct 36

Q Mr. Chiarello, at my request, in the month of January, 1976, did you take certain photographs of the trestle and roadway of the access road to the Bayonne Ocean Terminal?

A I believe you phrased that wrong, sir. You mean the Bayonne Bridge, not the Bayonne Ocean Terminal.

Q You are right. I reframe the question to say that.

A Yes, I did take pictures of the access road to the Bayonne Bridge.

Q I show you --

MR. LASSOFF: May I have this marked for identification, your Honor?

xxx (Plaintiff's Exhibit 1 marked for identification.)

MR. SCHULTZ: If your Honor please, at this time I think we ought to approach the Bench.

THE COURT: All right.

(At the side bar)

MR. SCHULTZ: If your Honor please, these pictures were in evidence. Counsel just removed the prior marking.

MR. LASSOFF: Of course, I did.

THE COURT: Why not?

MR. SCHULTZ: Number one. I am certainly going to ask him whether he marked this before.

THE COURT: Why?

MR. SCHULTZ: Why not?

MR. LASSOFF: This jury does not have to know there was a prior trial.

MR. SCHULTZ: It is going to go to this man's credibility. There has been some change in testimony already.

THE COURT: I will sustain the objection to the use of this photograph. It is already marked. Obviously he knows what to do.

MR. LASSOFF: I can't get a new photograph. Can I paste over the back and not show it to the jury until it is over?

THE COURT: He is not objecting to that. He is objecting to the markings already there. This witness is being told what to say.

MR. LASSOFF: No, your Honor.

THE COURT: It is leading the witness. You can't bring a photograph already marked up and make believe he is showing this jury for the first time what happened.

MR. LASSOFF: Those are Polaroid pictures, your Honor.

THE COURT: I can't help that. That is your problem. You are trying the case. He has made an objection and I am ruling on it.

MR. LASSOFF: I will see if I can erase these markings

overnight.

THE COURT: Okay.

(In open court)

Q Mr. Chiarello, what did you do after the accident?

A Sat in my car.

Q As you sat in your car, did somebody come over to you?

A Yes, sir, the bus driver did.

Q And as you sat in your car did you have a conversation with the bus driver?

A Yes, sir.

Q What, if anything, did he say to you?

A He came and asked me how I felt.

Q What did you answer?

A I said -- I told him I was shaken, dizzy and scared.

Q What, if anything else, did he say to you?

A He told me -- he says, "I'm sorry I hit you. I'm sorry."

Q Now, did you get out of your car at some time after this conversation with the bus driver?

A Yes, sir, I did.

Q At the time you got out of your car, did you go some particular place?

A Yes, sir, I went back to the bus to exchange licenses

and information with the bus driver and the gentleman that my car was pushed into.

Q Did the gentleman whose car your car was pushed into go with you to the bus driver's bus?

A He went there ahead of me, sir.

Q And did you go inside the bus driver's bus?

A Yes, sir, I did.

Q Did you exchange license information with both of these gentlemen while you were inside this bus?

A Yes, sir, I did.

Q Following this, what, if anything, did you do?

A Went back into my car. After we exchanged information, I got off the bus and got back into my car.

Q And what did you do in your car?

A I waited for the police to come.

Q Did the police come?

A Yes, sir, they did.

Q What police?

A First the Port Authority Police who have jurisdiction on the bridge and then --

MR. SCHULTZ: Objection, your Honor. Move to strike it.

THE COURT: Overruled.

A First the Port Authority Police, who have jurisdiction

on the bridge, and then the Bayonne police.

Q Did they obtain information from you as to the happening of this accident?

A No. They only asked me how I felt. I told them how I felt, that I was dizzy and shaken, and they asked me if I want to go to the hospital.

Q What did you tell them?

A I said, "I just want to go home," that's all I wanted to do.

Q After this accident, where you able to move your vehicle on its own power?

A No, sir. When the vehicle had been smashed into the car in front, the rear of his car had pierced -

MR. SCHULTZ: Objection, your Honor. I move to strike it.

THE COURT: Why? He is testifying to a physical fact.

MR. SCHULTZ: If your Honor please, he asked him was he able to drive his vehicle home. That can be answered yes or no.

THE COURT: All right.

Q Why couldn't you drive your vehicle?

A Because when the bus hit me and drove me into the car in front of me, the car in front of me, the bumper had

pierced the radiator and the water had come out of the radiator and there was no way I could drive it.

Q You were going from Bayonne, New Jersey, to Staten Island when this accident occurred?

A Yes, sir.

Q Did your car eventually get across this bridge?

A Yes, sir, it did.

Q Tell us how it got across this bridge.

A It was pushed across.

Q How was it pushed across?

A By the Port Authority Police. They have a car with a large rubber bumper on the front that they use to push disabled vehicles with. So they pushed me across, and as I held onto the wheel to steer because the back of my seat was still laying flat.

Q So you steered the car while you were pushed across the bridge, is that correct?

A Yes, sir.

Q What happened when you got across the bridge?

A Sat in the car for a few minutes. Then I got out and I sat on the wall in this recess area where you are allowed to park because there is a telephone booth there just prior to the tolls. I sat on the wall for awhile to collect myself. Then I went and called home to get somebody to come

and get me.

Q When you called home, was your wife home?

A No, sir, she was not.

Q Incidentally, were you married at the time of this accident?

A Yes, sir.

Q What is your wife's name?

A Angela.

Q When were you married?

A 11 June, '71.

Q When?

A No, '61. 11 June, '61.

Q Where were you married?

A Brooklyn.

Q At the time of this accident, was your wife residing with you and were you supporting her?

A Yes, sir, I was.

Q At the time of this accident, did you have any children?

A Yes, sir.

Q Will you give us the names and ages of your children at the time of the accident?

A Yes. Tracy, a girl, she was five; James, my son, he's nine; and Laura, my daughter, she's ten.

Q So that the record may be straight, Mr. Chiarello, are you saying your son is now nine or was nine at the time of the accident?

A You asked me at the time of the accident how old they were. Five, nine and ten.

Q Did somebody come to get you away from this bridge?

A Yes.

Q Who was that?

A My brother-in-law.

Q And how long after you called him did he get there?

A 20, 30 minutes.

Q Was June 30th a Friday?

A Yes, sir, it was.

Q When you got home, what did you do?

A Went to bed. Told everybody what happened, of course, but then I went to bed.

Q Did you attempt to reach anybody at that time?

A Yes, sir, I attempted to reach my doctor but he was out of town.

Q Who was your doctor?

A Dr. Rothman on Staten Island.

Q What did you do the next day?

A Stayed in bed.

Q Was that Saturday?

A Yes, sir.

Q Next day?

A Sunday I was still in bed.

Q Monday?

A I went to see Dr. L. Jackson Spitz.

Q Where?

A In Brooklyn, sir.

Q Do you remember where his office is located?

A I believe it's called the Carnarsie section of Brooklyn.

Q How did you get there?

A My wife drove me there.

Q When you got there, what, if anything, did you complain to the doctor about?

A I told him what had happened and I complained of severe pain in my neck, right shoulder, right arm, hand and back, lower back.

Q What, if anything, did Dr. Spitz do for you?

A Gave me physical therapy and heat was about the only thing he could do for it.

Q When did you see Dr. Spitz again?

A On the 5th. It was two days later I saw him again.

Q What did he do for you on that occasion?

A Same thing.

Q Following this second visit to Dr. Spitz, did there come a time when you changed doctors?

A Yes, sir. Dr. Spitz had suggested instead of having to drive all the way into Brooklyn that I should find --

MR. SCHULTZ: If your Honor please --

THE COURT: Sustained.

Q Just what you did.

A Okay. I went back to Dr. Rothman, who, in turn, sent me to a neurosurgeon, Dr. Urs.

Q Was Dr. Rothman your family physician who was on vacation when this accident happened?

A Yes, sir

Q So you went to a Dr. Urs?

A Yes, sir.

Q Where was his office at?

A In Staten Island, sir.

Q What did he do for you?

A Gave me a neck brace and sent me for physical therapy at St. Vincent's Hospital in Staten Island and Richmond Memorial Hospital in Staten Island.

Q How long were you under Dr. Urs' care?

A From July of '72 through November of '72.

Q During the time you were under Dr. Urs' care, what

parts of your body were being treated?

A Neck, right arm, right shoulder and back.

Q Did Dr. Urs send you to any other doctors while he was treating you?

A Yes, sir. He sent me to a neurosurgeon, Dr. Frank.

Q And while you were seeing Dr. Urs, did you see any other doctor?

A Yes, sir. I was still seeing Dr. Spitz.

Q Did you see a Dr. Moreno?

A Yes, sir, I did. Let's see, we're into November. Around November.

THE COURT: The question is, "While you were seeing Dr. Urs, did you see any other doctor?" You said, yes, you went back to Dr. Spitz.

THE WITNESS: Yes, sir.

THE COURT: Anybody else in the period July, '72, to November, '72?

THE WITNESS: No, sir.

THE COURT: What were you seeing Dr. Spitz about?

THE WITNESS: I was having problems with sex, sir, or impotency, whatever you want to call it.

Q When did you go back to Dr. Spitz with those problems?

A About September.

Q Of 1972?

A 1972, yes, sir.

Q Besides Dr. Frank and Dr. Urs and the St. Vincent's Hospital and Richmond Memorial Hospital, did you see any doctors in that period of time between July and November, 1972?

A Yes, sir. I saw a Dr. Louis Moreno.

Q What kind of doctor is he?

A He is a neurosurgeon or an orthopedic surgeon. That one I don't know.

Q Did he send you to another doctor?

A Yes, sir. He sent me to Dr. Leventhal.

Q What kind of doctor is Dr. Leventhal?

A He is a neurosurgeon.

Q What did Dr. Leventhal do?

A He took all types of examinations, EEG's, EMG's, EKG's, electrical brain waves, stimulus to the fingers and stuff like that, and eventually made arrangements for me to go to have a myelogram done at Richmond Memorial Hospital in Staten Island.

THE COURT: Where is Dr. Leventhal?

THE WITNESS: He is in Staten Island. He is a partner of Dr. Frank.

Q Did you have a myelogram done at Richmond Memorial

Hospital in Staten Island?

A No, sir, I did not.

Q Were you able to be admitted into Richmond Memorial Hospital in Staten Island?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

Q Was there some reason that you did not have this myelogram at Richmond Memorial Hospital?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Yes,sir, there was.

Q What was that reason?

A In December --

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

A In December of '72 there was a flu epidemic and the only people going into hospitals were very old, very young and people with respiratory infections. They weren't taking anybody in for myelograms or anything like that.

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

MR. SCHULTZ: Move to strike.

THE COURT: Overruled.

Q What did you do in December or January of 1972 when

you were not admitted into the Richmond Memorial Hospital.

THE COURT: Your dates are wrong. January, '73.

MR. LASSOFF: January, '73. Yes, your Honor.

A The pain had become quite excessive by that time.

Q Where?

MR. SCHULTZ: Move to strike, if your Honor please.

THE COURT: Overruled.

A Where?

Q What pain are you talking about?

A I am talking about the neck, the shoulder and the lower back pain had become very, very bad.

Q Tell us about it. What did it feel like?

A It's very hard to explain. It's like somebody taking a very, very hot knife and shoving it into your back and twisting it, and the pain radiates all over. It just goes all over.

Q What did you do in January of 1973?

A My father had come up from his home --

Q Just tell us what you did, not your father, uncle or aunts.

A I called my cousin in Richmond, Virginia, who is a gynecologist. He made arrangements with a neurologist friend of his for me to come down and see him and enter a hospital down there for the myelogram.

Q And what hospital was that?

A That is Richmond Memorial Hospital in Virginia, the same name as the one in Staten Island, except in Richmond, Virginia.

Q Were you admitted into the Richmond Memorial Hopsital in Staten Island -- Richmond, Virginia? Excuse me.

A Yes, sir, I was.

Q How long did you remain in that hospital?

A Five days, I believe it was, January 26th through 31st of '73.

Q What, if anything, was done to or for you while you were in that hospital?

A I had a lot of tests done but mainly the myelogram was taken.

Q Were you conscious during the performance of this myelogram?

A Yes, sir. That's necessary.

Q Will you tell us what was done in administering this myelogram?

A Yes, sir. You lay on your stomach on an X-ray table with a fluoroscope machine in the room also. They take a syringe and insert it into the spinal canal down in the lumbar region. They then --

MR. SCHULTZ: If your Honor please, I will respectfully

object and move to strike.

THE COURT: He can't see where they put a pin.

THE WITNESS: You feel it, sir.

MR. LASSOFF: I don't know. I have been lucky. I haven't had one.

THE COURT: The witness says he described where it occurred from the insertion of whatever they inserted. I will let it in.

Q Is that what you are saying, Mr. Chiarello?

A I am saying that you can feel the needle enter the spine.

Q Where did it enter your spine?

A Right on --

Q Stand up and show the jury, please.

A Yes (demonstrating). I won't take off my shirt. It's right down in here, just about the base of the spine.

Q Just above your belt level?

A It's right there.

THE COURT: Showing the jury where it is.

Q Go ahead.

A They poured dye in through the cone on the needle. It's inserted into --

THE COURT: That you can't tell us because you don't know.

THE WITNESS: Can I tell you what the doctor told me?

THE COURT: No.

Q Tell us what they did after the needle.

THE COURT: After the needle what did you experience?

THE WITNESS: There is a growing pressure inside your back. You can feel a growing pressure inside your back. At that time they tilt the table head down. You are braced -- your shoulders are braced and your hands are braced while you are laying on your stomach and they tilt the table to cause the dye to run down your spinal canal.

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Tell us what you saw happen. They tilt the table down?

THE WITNESS: Yes, sir, they tilted the table down.

THE COURT: Then what?

THE WITNESS: My hair was standing on end from the pain of whatever they did to me. How can I tell you.

THE COURT: Mr. Lassoff, you know how to put the question.

Q Without going into what people told you, all we are interested in is what happened. Did they rotate your body in various positions?

A Yes, they did, some with my head down, some standing

straight on my feet.

MR. LASSOFF: At this point, your Honor, I would like to offer in evidence the hospital record of the Richmond Memorial Hospital of Richmond, Virginia.

THE COURT: Show it to Mr. Shultz.

(Pause)

THE COURT: I suggest we adjourn until tomorrow morning at ten o'clock. I am trying to find out if you come back here or go to my regular courtroom. I have another jury out deliberating at this time.

(Pause)

THE COURT: You may step down.

(Witness leaves stand)

THE COURT: We will meet in this courtroom tomorrow. The jury room is in the back. Ten o'clock tomorrow morning. Thank you.

(Adjournment to 10:00 a.m., March 4, 1976)

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THOMAS J. CHIARELLO and
ANGELA CHIARELLO

vs. 73 Civ. 2962
75 Civ. 1956

DOMENICO BUS SERVICE, INC.,
and HENRY GIRDWOOD

March 4, 1976
10:00 a.m.

(In Robing Room)

THE COURT: Yes, Mr. Schultz.

MR. SCHULTZ: If your Honor please, there are several matters that I wish to take up, if I may, your Honor.

One is I understand that the papers that I filed with relation to the amendment of my pretrial order which really there were two amendments that were proposed and the objection to the plaintiff's notice that he would move to amend his pretrial order, I understand they were found down in the clerk's office yesterday afternoon.

THE COURT: I already ruled on them substantively. What are you worried about them?

MR. SCHULTZ: In that first one that was filed on February 25th, since there was some testimony as to -- that there was a vehicle stopped in front of the plaintiff and that he proceeded to go, that there may be some issue of contributory negligence and I wanted to -- I did serve a

notice I would move to amend so as to put that in issue.

MR. LASSOFF: That was a stipulated concession that there was no issue of contributory negligence. What are we talking about here?

THE COURT: Did you so stipulate?

MR. SCHULTZ: I did not. There was in the pretrial order, the original pretrial order, that there would be no issue of contributory negligence. There is no question about that.

THE COURT: Then I won't allow the amendment.

MR. SCHULTZ: All right, sir. The next thing that is to me of great importance, if your Honor please, at the first trial pictures were marked in evidence and witnesses, including the plaintiff and the defendant, made markings on those pictures. The attorney for the plaintiff yesterday, Mr. Lassoff, removed from those pictures -- from the one picture anyway --

MR. LASSOFF: From all pictures, Mr. Schultz.

MR. SCHULTZ: I am talking about the one yesterday that I saw. I don't know what you did. He removed from that picture the court reporter's marking that it had been marked in evidence in January of 1976. I objected, first of all, to that procedure.

Mr. Lassoff informs me this morning that he has

erased from those previous court exhibits the markings that were put on by the various witnesses.

If your Honor please, that is highly irregular, owing to the fact that if this matter is the subject of appeal, pre-existing or prior exhibits have now been tampered with --

THE COURT: Wait a second. They weren't tampered with. You made an objection yesterday that it was unfair to show the witness a photograph with markings already on it because you would be attacking his credibility and if they showed where the markings were on the first trial he would be led to the answer. That was your objection yesterday. They weren't tampered with.

MR. SCHULTZ: He removed them.

THE COURT: So the witness' credibility would be open to your cross examination.

MR. SCHULTZ: If your Honor please,he could have had copies of these pictures.

MR. LASSOFF: It is a Polaroid picture.

THE COURT: They are Polaroid pictures. Your objection is overruled. Next point.

MR. SCHULTZ: First of all, if your Honor please, I think it's improper to remove markings --

THE COURT: Then I will let them go in with the

markings on. Which way do you want it? You have your choice. You, yesterday, objected to showing them to the witness with the markings on, and properly so. So I said take the markings off so the witness can now mark them without any leads as to what he had said on the first trial. Now this morning you come in and say, "You shouldn't do that."

MR. SCHULTZ: Of course not, your Honor.

THE COURT: You can have it either way, Mr. Schultz. Make up your mind. You make your record, you said what you wanted to say. You can have it either way. Either they are shown to the witness with the markings on or they are shown to the witness with the markings off.

MR. SCHULTZ: They should be shown with the markings on and the fact, also, they were in evidence in a prior trial.

THE COURT: I will not tell this jury that there was a prior trial, Mr. Schultz.

MR. SCHULTZ: If your Honor please, I have the choice --

THE COURT: You are wasting time. You have made your point. I have ruled.

MR. SCHULTZ: May I be heard on this?

THE COURT: No. You have already put it on that record.

MR. SCHULTZ: I am talking about your last ruling, that this jury will not know about a prior trial.

THE COURT: I will not tell this jury about a prior trial and if you bring it in I will rule a mistrial. I think it is highly improper to let a jury know they are sitting on a second trial if you can avoid it.

MR. SCHULTZ: He has testified at the prior trial and at his own deposition. At this stage, at this trial, he has now testified and added to those things that were not in the prior trial or in his deposition.

If your Honor please, to me that's an issue of credibility.

THE COURT: Yes, but you can do it without saying it was a prior trial, Mr. Schultz.

MR. SCHULTZ: How am I going to establish out of the transcript?

THE COURT: Get the transcript and say, "Did you ever testify before," without mentioning a prior trial. It's done every day in the week in a criminal trial, Mr. Schultz, and you can do it if you want to without letting the jury know there was a trial before.

MR. SCHULTZ: In other words, your Honor is precluding me?

THE COURT: Yes, and I have done it and every judge

in this court has done it. If you do it it will be deliberately done, Mr. Schultz. I am telling you that now. If you can't, as an experienced trial lawyer, use the prior testimony without telling that jury that there was a prior trial, you have done it deliberately.

MR. SCHULTZ: If your Honor please, if it's done it will not be done deliberately.

THE COURT: Then make sure it doesn't happen. It's highly improper.

Go ahead, next point.

MR. SCHULTZ: If your Honor please, right after the close of the testimony yesterday Mr. Chiarello went back to his wife and she was sitting in the courtroom, he went back to her and he said in a voice that was clearly perceptible to everybody that he can't stand any more of this. They then exited from the courtroom, Mrs. Chiarello and Mr. Chiarello, and at that time Mrs. Chiarello was in tears. I left with my partner, Miss Mulholland. When I went out in the hall, two of the jurors were there, only two, and Mr. and Mrs. Chiarello were there. I cannot say what was said because I wasn't there, I didn't hear it. It would be improper to do so. Mrs. Chiarello was in tears and it's obvious that they had been out there for some period of time. It would appear to me that they obviously had to say something.

Certainly it was within earshot of these jurors. If your Honor please, I believe that's irregular.

THE COURT: I can't control a person's feelings and emotions.

MR. SCHULTZ: The next thing, if your Honor please, is when you set this case down for a trial on March -- you set it down for March 3rd and you instructed that there would be memos of law and requests to charge and questions for the voir dire to be filed with your Honor's office on March 1st, I did so. I received nothing from the plaintiff's attorney as to new requests to charge or anything else.

MR. LASSOFF: I didn't submit any new requests to charge. I submitted the same requests to charge.

THE COURT: I have a letter. Did he send a copy to you?

MR. SCHULTZ: No, I didn't receive anything from him.

MR. LASSOFF: Exactly the same.

THE COURT: He had no questions on voir dire, he had a memorandum of law, he had requests to charge and he had the amendments to the pretrial.

MR. SCHULTZ: I received none of that.

MR. LASSOFF: There is nothing new there, Mr. Schultz.

MR. SCHULTZ: Did you mail me a copy, sir?

MR. LASSOFF: I don't know.

THE COURT: No, you did not.

MR. LASSOFF: Because there was nothing new, your Honor. I mailed him a copy of the amendments to the pretrial order, the requests to charge --

THE COURT: He says they are the same.

MR. LASSOFF: There is nothing new.

THE COURT: So you then have it. I haven't checked these. They look like a Xerox copy.

MR. LASSOFF: They are.

THE COURT: Three requests to charge, referring to the Jersey vehicle and traffic regulation. You can check your file and see if you received those on the last trial. Besides, you are not prejudiced. If you want this copy, I will give you my copy.

MR. LASSOFF: I will give you a copy, Mr. Schultz.

THE COURT: If you have a copy, give it to him.

MR. LASSOFF: I have copies.

(In open court - jury present)

T H O M A S J. C H I A R E L L O, resumed.

MR. LASSOFF: While Mr.Chiarello is taking the stand, I offered yesterday Richmond Hospital records.

THE COURT: Do you have an objection, Mr. Schultz?

MR. SCHULTZ: Yes.

THE COURT: What?

MR. SCHULTZ: First of all, I don't see any certification on it. Secondly, your Honor, it's a copy. Thirdly, if your Honor please, there apparently is included in this portions of letters which are definitely not part of a hospital record.

THE COURT: You can redact those portions of the letters. Aside from that, the objection is overruled.

xxx (Plaintiff's Exhibit 2 received in evidence.)

MR. LASSOFF: I offer in evidence the St. Vincent Hospital record.

THE COURT: Any objection?

MR. SCHULTZ: No, your Honor.

MR. LASSOFF: There is also attached to that record an authenticated bill.

xxx (Plaintiff's Exhibit 3 received in evidence.)

MR. LASSOFF: At this point the defendant would like to offer in evidence a certified copy of the Richmond Memorial Hospital of a certified bill for services to Mr. Thomas Chiarello during his stay at that hospital. This has been shown to Mr. Schultz.

MR. SCHULTZ: No objection.

xxx (Plaintiff's Exhibit 4 received in evidence.)

DIRECT EXAMINATION CONTINUED

BY MR. LASSOFF:

Q Mr. Chiarello, when you got out of the hospital in Richmond, Virginia, where did you go?

A I came back to Staten Island.

Q And whose care were you under from that time on until you left for Florida?

A Dr. L. Jackson Spitz.

Q And how often were you seeing him?

A Approximately once a week, sir.

Q For how long?

A From the time that I got out of -- that would be January, '73, to the first of August, '73.

Q And what treatment, if any, were you receiving from Dr. Spitz?

A Physical therapy, wet heat, electrical treatment and injections.

Q To what parts of your body?

A Neck and lower back, sir.

Q While you were under Dr. Spitz's care, did he refer you to any other doctors?

A Yes, sir, he did.

Q Who did he refer you to?

A A Dr. Lanier in Brooklyn.

Q What type of a doctor is Dr. Lanier?

A He is an orthopedic surgeon.

Q When did you see Dr. Lanier, if you recollect?

A March, 1973, sir.

Q Now, following your examination by Dr. Lanier, were you sent to another orthopedic surgeon?

A Yes, sir, Dr. Friedman in New York.

Q And when was that? Would May refresh your recollection?

A Yes, May.

Q May, '73?

A Yes.

Q When you were sent to Dr. Friedman, were you sent by your lawyer at that time, Mr. Heckerling?

A Yes, sir, I was.

Q Incidentally, did you live in a private home in Staten Island?

A Yes, sir, I did.

Q Did you own that home?

A Yes, sir, I did.

Q Would you describe that home to us?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

Q Did that home have a swimming pool?

MR. SCHULTZ: Objection, your Honor.

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THE COURT: Sustained.

Q Did there come a time when you moved to Florida?

A Yes, sir, I did.

Q For what reason did you move to Florida?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A There were a couple of reasons. Number one, it had been suggested --

MR. SCHULTZ: Objection, your Honor.

THE COURT: If a doctor suggested it I will take it.

THE WITNESS: Yes, sir, it was, sir.

Q Tell us.

A Dr. Lanier had suggested that a warmer climate would be more advantageous to the condition that I had.

Q And the other reason?

A Economically; economics.

Q I don't know what that means. Will you tell us what it means?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A Well, in Florida it costs less to live because --

Q All right.

A It costs less to live.

Q Was there some reason that you moved to Florida in

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August of 1973?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q Mr. Chiarello, August in New York is pretty hot, is it not?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

Q When you moved to Florida, Mr. Chiarello, who did you stay with?

A My father, sir.

Q When you moved to Florida, did you sell your house?

A Yes, sir, I did.

Q How much money did you receive for the sale of your house?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

Q When you went down to Florida did you purchase a house?

A Yes, sir, I did.

Q At the time you moved to Florida was that house built or was it being built?

A No, in the community I bought you buy the land separately and then you have the house built. The land

does not belong to the builder.

Q Is this a development of some type with different choices of houses in the development?

A Yes, sir. Westinghouse owns all the property there and they have approximately 30 builders building there and you select which builder at which price range you can afford.

Q When did you move into this house in Florida?

A 27 November of '73.

Q When you got to Florida, did you come under the care of a physician?

A Yes, sir, I did.

Q And what physician's care did you come under?

A First of all and primary doctor is Dr. Samuel P. Leone in Hallandale, Florida.

Q What type of a doctor is Dr. Leone?

A He is an orthopedic surgeon.

Q Are you expecting Dr. Leone here today to testify in this case?

A Yes, sir, I am.

Q What did Dr. Leone do when he saw you first?

A Took a complete physical examination, X-rays --

MR. SCHULTZ: If your Honor please, may I respectfully object if the doctor is going to testify?

THE COURT: He can tell what happened to him. He underwent it. Go ahead.

A And physical therapy, sir.

Q Did he refer you to another doctor?

A Yes, sir, he did.

Q What doctor did he refer you to?

A Dr. Stephen Gervin in Hollywood, Florida.

Q And what type of a doctor is he?

THE COURT: How do you spell that?

THE WITNESS: G-e-r-v-i-n.

Q What type of a doctor is Dr. Gervin?

A He is a neurosurgeon.

Q Did you continue under the care of Dr. Leone and Dr. Gervin for some period of time before being admitted to a hospital?

A Yes, sir, I did.

Q How many times did you see Dr. Gervin before you were admitted to a hospital?

A Two or three at the most, sir.

Q What hospital were you admitted to?

A Golden Isles Hospital in Hallandale, Florida.

Q Can you tell us when you were admitted to that hospital?

A In December.

Q Of 1973?

A In 1973; December, 1973. It was early. I believe it was the second or third. I can verify that if you would like.

Q Who admitted you to that hospital?

A Dr. Gervin and Dr. Leone.

Q What was done for you in that hospital?

A They operated. First they did another myelogram and then two days later they operated.

Q Where did they operate?

A Lower back, lumbar region.

Q How long were you in the hospital?

A Thirteen days.

Q At the time you first saw Dr. Leone and Dr. Gervin, would you tell us how you felt with relation to the injuries you claim you sustained in this accident?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Yes, sir. The pain was extremely severe in my lower back. It had become much, much worse. Radiation of pain into the buttocks and into the right leg was quite severe with loss of power in the right leg. It had a tendency at times to collapse.

Q When this operation was performed, were you under a

general anesthetic?

A I'm sorry, I don't quite know what you mean by general anesthetic.

Q Were you conscious or unconscious.

A Unconscious. You have to be for this one.

Q When you came to after the operation, do you remember where you were?

A Yes, sir. The first thing I remember coming to was in the intensive care ward. I was there for two days. I don't remember too much about it. You have the tubes up your nose and intravenous in your arms.

MR. SCHULTZ: Objection, your Honor.

THE WITNESS: I saw it.

THE COURT: Overruled.

A You have intravenous in your arms. Whenever they saw me open my eyes they gave me a shot of morphine through the intravenous.

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Sustained.

MR. SCHULTZ: Move to strike it.

THE COURT: Strike it.

Q Just tell us what you saw them do, not what you think they did it for.

A Whenever I opened my eyes --

THE COURT: He wouldn't know what they gave him. That is my point.

MR. LASSOFF: I am sorry.

Q Did they give you some kind of injection?

A Yes, sir, they did.

Q When you came to on those occasions, were you in pain?

A Extreme, utter pain.

Q While you were in the Golden Isles Hospital in Hallandale, Florida, did something occur with relation to you and the tubes that were in you at the time?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

A Yes. I had been out of intensive care and back in my room for approximately two days when they started giving me pain pills.

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Sustained.

MR. SCHULTZ: Move to strike it, please.

THE COURT: Strike it.

A When they started giving me pills. And the first night they gave me the pills I had extremely bad nightmares and when I did wake up I was over the side of the bed. I had torn the intravenous from my arms and I was laying half

out of the bed head first, screaming, and the nurse had to call the orderlies to come and put me back into bed and get the intravenous back in.

MR LASSOFF: At this point, your Honor, the plaintiff would like to offer into evidence the hospital record of the Golden Isles Hospital, Hallandale, Florida.

THE COURT: Show it to Mr. Schultz.

MR. SCHULTZ: Excuse me for one moment, if your Honor please.

(Pause)

MR. SCHULTZ: No objection, your Honor.

xxx (Plaintiff's Exhibit 5 received in evidence.)

Q Incidentally, Mr. Chiarello, when you came back from Richmond, Virginia, did you come back with the results of the myelogram?

A Yes, sir, I did.

Q Did you give those results to Dr. L. Jackson Spitz?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Yes, sir.

Q How did you feel during the thirteen days you were in the hospital, Mr. Chiarello?

A It's very difficult to explain that, because I felt extremely bad. There is a tremendous amount of pain to an

operation in that back area.

Q How did you leave the hospital?

A How did I leave the hospital, sir? With a walker and my wife drove me home.

Q Following the operation and following your leaving the hospital, did your pain at that time remain the same, get better or get worse?

A It remained the same for a few weeks afterwards and an amount of convalescence at home.

Q When you returned home, did you return to any doctors for care after this operation on your spine?

A Yes, I went to Dr. Leone and Dr. Gervin, both.

Q Did there come a time after the operation when the pain in your spine became worse?

A In chronological order, yes. Yes, it did.

Q When?

A Approximately February.

Q February of 1974?

A '74.

Q And what, if anything, did you do or have done to you at that time?

A Dr. Gervin suggested I use a machine.

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Sustained.

A Dr. Gervin gave me a machine to use.

Q He prescribed a machine for you?

A Yes, sir. He gave it to me. He had to get it for me. You cannot get them without a prescription, sir.

Q What type of machine was that?

A Transcutaneous stimulator.

Q Where did you wear -- do you wear that machine when you use it?

THE COURT: Ask him to describe it.

Q How big is this machine?

A It's only about five of six inches tall. It's like those beepers you wear on your belt, if you have ever seen one, a doctor or office man wears a beeper. It's like that, approximately the same size as that.

Q Did you have to wear that machine?

A Yes, sir, I did.

Q Where did you wear it?

A You hook it onto your belt and you have two wires from the bottom which go -- which at the ends of the wires, opposite ends are plugged into the box. There are two black pads, two black plastic pads. You put the pads on both sides of the spine where the operation was, and you stick them on with adhesive tape.

Q Incidentally, was the area where the operation was

performed the area of your spine that you showed to the jury yesterday?

A Yes, sir, it is.

Q Now, when you were given this machine and used it, did it help you?

A For a time, yes, sir, it did.

Q Did there come a time when you stopped using that machine?

A Yes, sir.

Q Can you tell us why you stopped using that machine?

MR. SCHULTZ: Objection.

THE COURT: First of all, when?

THE WITNESS: Sir, about two months after I started using it.

THE COURT: That would be April?

THE WITNESS: Yes, sir, that's approximately right, sir.

THE COURT: You may say why you stopped using it.

THE WITNESS: All right, sir.

May I explain to them what it does?

THE COURT: He wants to know why you stopped using it.

THE WITNESS: All right. The pain got worse than the machine could handle.

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MR. SCHULTZ: Objection, your Honor, and move to strike.

THE COURT: Take out the words "than the machine could handle."

I will let in, "The pain got worse."

A The pain got worse was number one. Number two, it started to burn my back, irritate or burn my back.

THE COURT: From the use of the machine?

THE WITNESS: Yes, sir, from the pad. When the pads pull away from your skin --

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A When the pads pull away from your skin it creates an arc -

THE COURT: Are you going to describe the electrical operations of the machine? I will sustain the objection.

You say you used the machine, it burned and irritated your back?

THE WITNESS: Yes, sir, it did.

THE COURT: All right.

Q Can you tell us, when the pain in your back got worse while you were using this machine, were you sent by Dr. Gervin to another type of doctor?

MR. SCHULTZ: Objection as to form.

THE COURT: Overruled.

A Yes, sir, I was.

Q And what type of a doctor were you sent to by Dr. Gervin?

A A psychiatrist.

Q Do you remember his name?

A Dr. Zaber.

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

Q At the time you went to Dr. Zaber, will you tell us how you were acting and feeling?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: We will have a conference at the Bench.

(At the Bench)

THE COURT: I didn't know there were any psychiatric claims in this case.

MR. LASSOFF: There are in the pretrial order and have been from the beginning. It is also in Dr. Gervin's report and in the hospital records.

THE COURT: I don't care what is in Dr. Gervin's report or in the hospital records.

(Pause)

THE COURT: My recollection is at the first trial the psychiatric problem was sexual impotency.

MR. LASSOFF: There was more than that.

THE COURT: That is the way it is written here. I won't let it in.

MR. LASSOFF: May I see the pretrial order a minute?

THE COURT: Yes. You lumped it together as one and I interpret it as sexual impotency. I think I so ruled that way the first trial.

MR. LASSOFF: Your Honor did let in testimony as to suicidal.

THE COURT: I didn't let it go to the jury on the basis of psychiatric condition.

I won't let it in.

(In open court)

Q Can you tell us, did there come a time -- withdraw the question.

Did you continue under the care of both Dr. Gervin and Dr. Leone?

A Yes, sir, I did.

Q Did there come a time when you were admitted to another hospital for another operation?

A Yes, sir.

Q Can you tell us when that was?

A I believe that was October, '74, sir.

Q And what hospital was that?

A Memorial Hospital in Hollywood, Florida.

Q Do you know what type of an operation was performed on you at that time?

A Yes, sir.

Q What is the name of that order?

A Rhizotomy.

Q Who put you in the hospital for that operation?

A Dr. Gervin.

Q How long were you in the hospital?

A Two or three days.

MR. LASSOFF: At this time, your Honor, I would like to offer into evidence the hospital record of Memorial Hospital with relation to the rhizotomy.

MR. SCHULTZ: If your Honor please, I will object unless there is an admission or concession if Dr. Gervin is going to be called.

MR. LASSOFF: This was marked in the pretrial order, your Honor. All objections were waived.

THE COURT: I will let it in.

xx (Plaintiff's Exhibit 6 received in evidence.)

Q When this operation was performed, Mr. Chiarello, was it performed while you were conscious?

A Yes, sir.

Q Would you describe this operation to the jury?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: To the extent he saw it, he may do it.

A They put you on an X-ray table with a fluoroscope. There is a machine there, an electrical machine there, with two wires coming from it and at the end are two long needles. These needles are inserted in your back. While they are inserting the needles they look in the fluoroscope to make sure --

MR. SCHULTZ: Objection, if your Honor please. Move to strike.

THE COURT: Go ahead.

A While they insert the needles they are watching the fluoroscope to get the point of the needles as close to the damaged nerve ending --

MR. SCHULTZ: Objection. Move to strike.

THE COURT: Sustained.

A They insert the needles alongside your spine. At that time they build up pressure --

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained. You are having a doctor that can testify to this. You don't need this witness to do it.

MR. LASSOFF: That's true.

Q Would you tell me with particularity, Mr. Chiarello,

what you felt during the course of this operative procedure?

A Extreme pain.

Q Incidentally, would you tell us your date of birth, please.

A 14 January, 1937.

Q Prior to this accident, what was the state of your health?

A Excellent. I would like to amend that. My health was good other than I had hypertension.

Q High blood pressure?

A High blood pressure, yes, sir.

Q Mr. Chiarello, would you tell the jury what you weigh in court here today?

A 260.

Q How big are you, how tall?

A 6-2½.

Q Mr. Chiarello, when you were in high school, were you a football player?

A Yes, sir, I was.

Q What did you weigh in high school?

A 235.

Q In playing football or any other sports while you were in high school or any other time in your life, have you ever been injured?

A None that I know of, sir.

Q Following high school, did you enter the Armed Forces of the United States?

A Yes, sir, I did.

Q Which branch?

A United States Air Force.

Q How long were you in the Air Force?

A Four years, sir.

Q What was your job in the Air Force?

A For two years I was a basic training instructor at Lackland Air Force Base. For the final two years I was an on-the-job training instructor for Lycoming Engines.

Q At any time in your life prior to this accident had you ever had an accident of any kind?

A Had I ever had an accident of any kind?

Q Where you were injured.

A Where I was injured, no, sir.

Q Subsequent to this accident, have you ever had an accident where you were injured?

A Subsequent meaning prior or after?

Q It means after.

A No, sir.

Q Are your father and mother still alive, Mr. Chiarello?

A Yes, sir, they are.

Q How old is your father?

A 68, sir.

Q How old is your mother?

A 63, sir.

Q Would you describe generally your father's build with relation to you?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

Q Is your grandmother still alive, Mr. Chiarello?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

Q Following this procedure in the hospital, what, if anything, did you feel with regard to the injuries you had before the procedure?

A You are talking of the rhizotomy, sir?

Q Yes.

A The pain in the right leg had diminished significantly afterwards. The pain in the back was still there.

Q Following this procedure, did you continue under the care of Dr. Gervin and Dr. Leone?

A Yes, sir.

Q Did there come a time when the pain in your back returned?

A It was always still there. It got worse.

THE COURT: He has already told you it didn't diminish.

Q I meant your right leg, Mr. Chiarello. I am sorry.

A Yes, sir, it has returned.

Q When it returned, would you tell us how and of what strength?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A It returned approximately the same way it was before, with pain radiating into the buttocks and down the right leg, but now only approximately halfway down the right leg on the right-hand side and back.

Q At your house in Florida, do you have a swimming pool?

A Yes, sir, I do.

Q Was that prescribed for you by a doctor?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A Yes, sir, they told me to get one.

Q Now, you continued under Dr. Gervin and Dr. Leone's care after the rhizotomy. Did there come a time when you were admitted to another hospital?

A Yes, sir.

Q And when was that?

A I'd have to look on a piece of paper here, if it's all right with you.

THE COURT: Yes.

Q To save time would July 28, 1975, be approximately right?

A I was admitted to one prior to that, sir.

Q All right, tell me about that.

A That was July -- early July.

Q What hospital was that?

A Mt. Sinai, and it was as an out-patient, sir.

Q I asked you about being admitted. You went to Mt. Sinai as an out-patient?

A Yes, sir. I am sorry. I thought it was the same thing.

Q Did there come a time you were readmitted to the Memorial Hospital in Hollywood, Florida?

A Yes, sir.

Q When was that?

A That was on the 28th of July, 1975.

Q Who admitted you there?

A Dr. Gervin again.

Q What was done for you in the Memorial Hospital in Hollywood, Florida, at that time?

A A myelogram, another myelogram.

Q Did you bring the myelogram and the X-rays for the myelogram from the hospital to New York with you?

A Yes, sir, I did.

MR. LASSOFF: At this time, your Honor, I offer into evidence the hospital record and the myelogram of the Memorial Hospital in Hollywood, Florida, for the admission of July 28, 1975.

MR. SCHULTZ: No objection.

xxx (Plaintiff's Exhibit 7 received in evidence.)

Q Following this third myelogram that you had undergone, did you have a conference with Dr. Leone and Dr. Gervin and your family about the results of the myelogram?

A Yes, sir.

Q What were you advised was further medical treatment?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q What did you do?

A I left the hospital.

Q Following that myelogram, did you enter a hospital for any further surgery?

A No, sir, I did not.

Q Did you continue under the care of Dr. Gervin and Dr. Leone?

A No, just Dr. Leone.

Q Just Dr. Leone?

A Yes, sir.

Q Following your last visit with Dr. Gervin, did you --

THE COURT: We don't know when that was.

Q Will you tell us approximately when you last saw Dr. Gervin?

A The very closest I could come would probably be last November.

THE COURT: Last November?

THE WITNESS: Yes, sir. That's really rough, your Honor.

Q Following your last visit to Dr. Gervin, did you see another neurosurgeon?

A Yes, sir, I did.

Q What was that neurosurgeon's name? I am referring now in Florida.

A I can't remember his name, Mr. Lassoff.

Q Does the name Gerald A. Meier refresh your recollection?

A Yes, sir.

Q In January of 1976, at my request, did you see Dr. Arthur Friedman again?

A Yes, sir, I did.

Q And did you see a Dr. Lawrence Kaplan for the first time?

A Yes, sir, I did.

Q I want you to tell the Court and jury at the present moment each and every complaint that you have that you say is related to the injuries that you sustained in this accident.

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A I get extremely bad headaches. They last anywhere from fourteen to 24 hours. I take some fairly strong medication for them. It does not do them much good.

MR. SCHULTZ: Objection. Move to strike.

THE COURT: Does he know what he takes?

THE WITNESS: Yes, sir, I do.

THE COURT: What do you take?

THE WITNESS: Two capsules of Fiorinal along with -- I can't think of it, sir. My wife has them capsules.

THE COURT: Go ahead. Bad headaches. What else?

A Extreme pain in the lower back radiating to both buttocks, down the right leg, halfway down the right leg and halfway down the left leg.

Q What kind of pain?

A Very --

THE COURT: Extreme pain. What more do you want?

MR. LASSOFF: I didn't hear the word "extreme." I am sorry.

Q Besides your back and your head, is there any other part of your body that currently bothers you that you injured in this accident?

A Just the problem with sex that I have.

Q What is the problem with sex that you have?

A I have not been able to complete a sex act to its completion since the accident.

Q You were telling us before that you had trouble with your arm and your neck. Is that better now?

A My right arm is somewhat better, yes, sir. I do have some weakness but it's not as bad as it was. The neck is still sore, especially when the headaches occur, up underneath this back bone on the right side here.

Q While you were terminating this transcutaneous stimulator, did something occur with relation to the medicines that you had been given?

MR. SCHULTZ: Objection, your Honor.

THE COURT: I will take it. It is a little vague.

MR. LASSOFF: If I am specific, I am leading, your Honor. I don't want to lead. It is difficult.

THE COURT: Did they go bad?

MR. LASSOFF: I think the plaintiff knows what I am referring to. I don't want to lead him.

THE COURT: I think you could put the question without leading.

Go ahead. Obviously you have spoken to the plaintiff, the plaintiff knows what you are asking. So give him the answer.

A I was taking too much of the pain killer because of the pain, and the taking of the pills was taken out of my control.

Q What does that mean?

A My wife locked everything up on me. All my pills were locked up on me and she would give them out in the way it said on the bottle and only that way.

MR. LASSOFF: With the Court's permission, I see Dr. Friedman is in the courtroom. Since we have a way to go on other things, I am not finished with the plaintiff, but for the purpose of his testimony there is enough for him to testify. May I put him on?

THE COURT: Ask Mr. Schultz.

MR. SCHULTZ: Sir?

THE COURT: You are being asked whether you will consent to allow the plaintiff to step down and let Dr.

Friedman testify.

MR. SCHULTZ: Yes, sir. Before he does that, could we have about five minutes so I could look over his report again?

THE COURT: You may step down.

The jury may retire.

(Recess)

MR. LASSOFF: With your Honor's permission, I need one more question and answer from Mr. Chiarello.

Q Mr. Chiarello, after this accident, have you ever returned to work?

A No, sir, I have not.

MR. LASSOFF: Thank you. We will get you back later.

(Witness temporarily excused)

A R T H U R F R I E D M A N, called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LASSOFF:

Q Dr. Friedman, are you a physician duly licensed to practice medicine in the State of New York?

A Yes, sir, I am.

Q Do you maintain an office for the practice of your

profession?

A Yes, sir, I do.

Q Where is your office located?

A My office is in Manhattan at 14 East 90th.

Q Would you tell the Court and jury your professional training, qualifications, specialties, teaching position, if any, your background?

A Yes, sir. I graduated from the Hahneman Medical College of Philadelphia in 1952. I then started a one-year internship at the Beth Israel Hospital from 1952 to 1953, and upon completion of that internship I began a four-year training program and residency in the field of orthopedic surgery. This was from 1953 through 1957, and was at the Hospital for Joint Diseases in New York City.

Upon completion of that training program in the field of orthopedic surgery, I was commissioned as a medical officer in the United States Public Health Service, being stationed at their hospital in Staten Island and being in charge of the department of orthopedic surgery at that particular hospital. This tour of duty extended from 1957 through 1959.

In 1959 I entered the private practice of orthopedic surgery in New York City. As I stated my offices are at 14 East 90th. I am on the staff in the department of orthopedic

surgery of the Hospital for Joint Diseases, New York City, as well as Beth Israel Hospital, also New York City. My hospital appointment is that of associate orthopedic surgeon at each one of these hospitals.

I am the orthopedic consultant for the Beth Abraham Hospital in the Bronx. I am on the faculty of the Mt. Sinai School of Medicine in the department of orthopedic surgery. My faculty appointment and title is that of an assistant clinical professor of orthopedic surgery. I am a diplomate of the American Board of Orthopedic Surgery, a fellow of the American College of Surgeons, a member of the Association of Military Surgeons of the United States and I restrict my practice to the field of orthopedic surgery.

Q Doctor, sometime in May of 1973 did you examine Mr. Thomas Chiarello?

A Yes, sir, I did.

Q Would you tell us the date of that examination?

A Yes, sir. That was on May 14, 1973.

Q And did that examination take place at your office?

A It did.

Q Was Mr. Chiarello sent to you by a Mr. Heckerling, a lawyer that Mr. Chiarello previously had had in this case?

A That's correct, sir.

Q Have you at any time prior to January of this year ever

met, seen or talked to me or my office?

A No, sir.

Q Doctor, would you tell us what your examination consisted of?

A Yes, sir.

When I saw Mr. Chiarello on May 14, 1973, I obtained a history of an injury that took place on June 30, 1972, when he was driving a motor vehicle---

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A --that was struck from behind with great force by a bus from behind. At the time of impact he told me there was injury of a twisting and jarring nature to the entire back area, including the upper back, what we call the cervical spine, and more specifically the lower back, that part of the back which is known as the lumbosacral spine. And there was a progressive onset of pain and stiffness in the upper back and neck and the right shoulder and the right arm, and also progressive onset of pain and stiffness and severe pain in the right lower extremity and in the lower back region.

Because of these various complaints --

MR. SCHULTZ: If your Honor please, may I respectfully object. This is not a treating doctor, your Honor.

THE COURT: Overruled.

A Because of these various complaints, he sought medical care and treatment. He was originally seen by his family physician and because of the nature of his complaints, the nature of his problems, he was referred to an orthopedic surgeon, and he underwent a course of treatment by an orthopedic surgeon at that time in Staten Island because he was living in Staten Island at the time, and the doctor felt that there were findings indicating injury to the cervical spine --

MR. SCHULTZ: May I respectfully object and move it be stricken.

THE COURT: I will overrule that objection. Go ahead.

A After the treatment, which included various modalities of treatment for the neck and lower back, including --

MR. SCHULTZ: If your Honor please, I move to strike it. He is describing somebody else's treatment.

THE COURT: He is describing what the plaintiff told him, not what Dr. X told him. Objection overruled.

A He received treatment at the St. Vincent Hospital and Richmond Memorial Hospital in Staten Island.

THE COURT: Did you see the hospital records from either of those places?

THE WITNESS: Yes, sir.

THE COURT: All right.

A As his complaints continued, more specifically in the lower back region with severe pain in the lower back and in the right leg and the inability to stand and walk and move about, he was eventually --

MR. SCHULTZ: I am going to respectfully object.

THE COURT: You have objected several times. I have overruled you. You have a continuing objection.

MR. SCHULTZ: Thank you, your Honor.

A He eventually underwent a diagnostic procedure at a hospital which is known as a myelogram. The myelogram is a specific type of X-ray study of the spinal cord and the spinal column which helps in the diagnosis and the localization of a certain type of abnormality in the spine which is known as a slipped disc. The myelogram --

THE COURT: Are you referring to the myelogram in the Richmond Hospital in Virginia?

THE WITNESS: Yes, your Honor.

A This myelogram was performed in January of 1973 while he was a patient at this hospital in Richmond, Virginia. The myelogram was positive, indicating an abnormality, which was diagnosed at that time by the doctors as a slipped disc at the level of the fourth and fifth lumbar vertebral space.

Because of these complaints that he had, which did continue, he was disabled and could not engage in his usual occupation from the time of the injury.

The patient made certain complaints to me when I saw him in 1973, including the fact that he was using a neck brace, he was using a brace and support for the lower back, he was using some form of heat at home and also some form of traction device, which is a type of treatment or physical therapy for stretching purposes of the spine.

He also required continued use of various medications.

MR. SCHULTZ: Objection, if your Honor please, as to what he required.

THE COURT: Overruled.

A He required various medications for relief of pain.

The patient's complaints when I saw him in June of 1973 included that of continued pain and stiffness in the upper back and neck area and the fact that this pain traveled into the right shoulder and into the right arm with certain abnormal sensations in the right arm and right upper extremity and in the fingers of the right hand, which we described as numbness and paresthesia, in other words, indicating there was certain injury to the nerves that travel from the cervical spine area into the arm, producing not just complaints of pain but producing complaints of sort of pins and needles,

electric shock feelings and numbness in the fingers of the hand. These symptoms were aggravated by ar[illegible]ovement of the neck or the shoulder or arm.

He also had complaints of pain and stiffness in the lower back region. That is the part of the back which we call the lumbosacral area of the spine, the small of the back, and he complained to me this pain traveled from the back area into the right lower extremity, namely, the right hip, the right buttock, the right thigh area, and also in the right leg he had these complaints of abnormal sensation, electric shock-like feelings, numbness, paresthesia, pins and needles.

These complaints in the lower back and in the right leg were aggravated by attempted standing, attempted bending, lifting, any effort. They were aggravated by such efforts as sneezing or coughing or any strange effort. The patient, besides these complaints, had other complaints of severe headaches, nervousness, anxiety. He complained to me of a problem of sexual impotency since the onset of these complaints.

At that point, after having elicited his complaints, I examined the patient, and this examination was in the nature of an orthopedic examination, which, of course, relates to the areas that were injured and relates to the musculo-skeletal system, meaning the arms, the legs, the spine, and

what I did find on this examination in 1973 was that the patient walked with a marked right-sided limp, he was using a cane for purposes of walking, he had great difficulty when asked to walk without a cane. In fact, it was almost impossible. When he walked, I noticed that he bore most of the weight on the left leg and hardly any on the right leg. All movements of the lower back were painfully restricted. There was an abnormal condition in the lower back which is known as muscular spasm, meaning an abnormal contraction or a tightness of the muscles of the lower back, and this abnormal contraction and spasm of the muscle is seen as a response to an injury and is seen almost always with problems known as a herniated disc or slipped disc problem.

Q Doctor, may I stop you for one moment?

A Yes.

Q I note that the Richmond Memorial Hospital used the words "herniated disc" and you are using the words "slipped disc" at times. Are they the same?

A Yes, they are synonymous terms.

Q Continue, Doctor.

A I did find that there was certain motor weakness, in other words, weakness in the muscle, particularly the muscle that controlled the foot, the ankle and the toes on the right side. This would indicate that there has been

injury or compression, sort of squeezing, actual mechanical squeezing, of a nerve or group of nerves, and this also is seen almost always in cases of a slipped or herniated disc.

I found that there was extreme tenderness when I tried to press on certain areas of the lower back, certain areas of the hip and thigh. There were changes in the reflexes when you hit the extremity, namely, the leg, with a hammer. There were certain changes in the reflexes on the right which were not there on the left, indicating also evidence of compression of the nerve roots.

I found that there were areas of decreased sensation, normal feeling was absent when you touched the skin of certain portions of the leg. This was also consistent with a diagnosis of a herniated disc.

When I did certain other tests, including a test known as a straight leg raising test, when the patient is lying flat on the examining table and you ask him to lift his leg or you try to lift his leg, on the injured side where the problem is, the patient will have severe pain in the leg and back when he attempts to do that, and it isn't possible to complete that particular movement.

In relation to the injuries of the upper back and neck, I also found some degree of tenderness and limitation of motion, some spasm and contraction of the muscles.

In measurements of the legs, the muscles of the legs, I found that there was a half inch of atrophy or shrinkage of the muscles of the right leg. This would also be consistent with the fact that the normal impulses, nerve impulses, are not traveling the way they should be and the muscle is not responding and, therefore, begins to shrink.

The patient had great difficulty when asked to get on the examining table or off the examining table and in dressing and undressing.

I reviewed X-rays that had been taken at the Richmond Memorial Hospital in Richmond, Virginia. These were various X-rays including that of the myelogram and the myelogram did show changes which were consistent with a herniated disc at the level of L-4 and L-5, meaning the space where the disc is between the fourth lumbar vertebral area and the fifth lumbar vertebral area.

I also X-rayed the patient at my office. This was a normal routine X-ray, it was not a myelogram. These X-rays did not show any fracture, they did not show any dislocation of the bones. However, it did show there was a flattening of the normal curvature of the spine that one sees, a sort of hollowing out of the lower portion of the spine, which is a normal finding when you look at the spine in profile. The fact that this hollowing out was absent or

flattened would indicate a condition of muscle spasm or tightening.

It was my opinion, therefore, on the basis of that examination that this patient had sustained injuries during the episode of injury 30, 1972, these injuries were both to the upper back and to the lower back, the more significant injury, obviously, being to the lower back. As far as the upper back, I thought he had sustained a sprain of the muscles and the ligament with some irritation of the nerve roots. Also in that area which would explain the pain in the right shoulder and right arm. But the condition that actually disabled him at that point was the problem in the lower back which was that of a clear-cut diagnosis of a slipped or herniated disc, and it was my opinion in view of the fact that he had these complaints from 1972 up to 1973, and this was almost one year after the accident that he had sustained it, that the only treatment that would be worthwhile would be an operation, and I suggested to Mr. Chiarello at that time that he undergo an operation which would be for removal of the slipped disc. In other words, I felt that he had not responded to what we call conservative treatment, nonoperative treatment of restriction of activities, the use of a back brace and resting and physical therapy, and in a man of his age group who was anxious to go back to

a gainful occupation I suggested an operation with the understanding, of course, that the prognosis --

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Did you tell this to the plaintiff?

THE WITNESS: Yes, your Honor.

THE COURT: Go ahead.

A With the understanding that the prognosis in these operations is not always of the best and that a certain percentage of patients are almost cured or significantly improved but another certain percentage of patients are not helped at all.

THE COURT: What is that percentage?

THE WITNESS: It depends on the statistics you use, about in my experience, your Honor, I would say from 50 to 60 percent of the patients are significantly helped, approximately 30 to 40 may not be helped at all or may even have an exacerbation or increase of problems after the operation.

I felt he was at that time disabled, he certainly couldn't undertake any sort of gainful occupation. This was in 1973. As I mentioned, I suggested to him about the operation.

Q Doctor, at the time of this accident did you know Mr. Chiarello's occupation was that of a terminal superintendent for a stevedoring company?

A Yes, sir, I did.

Q At the time of your examination, Doctor, was it your opinion that Mr. Chiarello could do any sort of gainful work?

A No, sir, nothing at all.

Q Doctor, would you tell the jury what a disc is and what a herniated or slipped disc is?

A A disc is a normal anatomical structure. It's a piece of cartilage or gristle that is rather soft and elastic which serves as a cushion or a shock absorber between the bones of the spine, between what we call the vertebral bones, and, as I mentioned, its anatomical function is to keep the bones apart and to serve in the efforts of standing, walking, bending, lifting, that of a shock absorber, cushion. It has a certain envelope that contains a jelly-like substance of the disc. The central portion of the disc is known as the neucleus pulposis. The envelope, which is a thick, heavy, fibrous structure, is called the annulus, and in an injury, when an injury takes place, there is an opening, a slit sort of develops in the annulus and a portion of the softer pearl, the neucleus pulposis, will sort of squirt out through the slit to a greater or lesser degree. This is what is known as a slipped disc or herniated disc and it causes problems in the back and in the legs by causing pain --

excuse me -- by causing an actual squeezing or pressure on the nerves that lie in that area of the disc. These are the nerves that exit from the spinal cord through the spinal column and travel into the leg.

Q Would it be normal, Doctor, in the event of a slipped or herniated disc, for pain to increase over a period of time?

A Oh, yes.

Q Would that be due to the fact that the pressure on the spinal canal would be increasing?

A Yes, as you get increasing amounts of the neucleus pulposis squeezing out through the envelope, you get more pressure on the nerve, more inflammation takes place of the nerve. You actually get a swelling of the nerve, swelling and enlargement of the nerve, and then you even have the formation of scar tissue, an adhesion in the area of the nerve, and that causes pain and that progresses to an increasing degree.

Q Doctor, at my request did you examine Mr. Chiarello in January of 1976?

A Yes, sir.

Q At the time of that examination were you furnished with certain documents, X-rays and myelograms?

A Yes, sir.

Q Would you tell us what you were furnished with?

A I was furnished with X-rays that had been taken in Florida in July of 1975, which consist of a new myelogram that had been performed. I was also furnished with the various operative reports, hospital charts and reports from the doctors who had been treating Mr. Chiarello in Florida, including the actual operative report of the operation that was performed eventually in 1973, I believe in December, 1973, at which time he underwent surgery which is called a hemi-laminectomy, which means an opening up of the lower portion of the spine, removal of the portions of bone after you open up the muscles, and the removal of the herniated disc at the L4-5 level. This was done on December 5, 1973.

THE COURT: When you say removal, you mean the entire disc was removed or just the herniated portion?

THE WITNESS: The usual operative procedure --

THE COURT: What happened here?

THE WITNESS: The complete disc was removed.

A In reviewing the operative report, which is the actual report that the doctor who did the operation prepares as to what he found or what he did, the significant findings that I noted were that when they opened the spine the diagnosis was obviously confirmed, that that was the problem, that there was a slipped or herniated disc at that particular level,

but the more significant finding was that there were marked adhesions and scar tissue of the nerve root over the disc and it was necessary to free up the nerve root in order to approach the disc and to remove the disc.

When one sees this in an operative report related to an operation of the lower back, one always can predict that the prognosis for a successful operation is rather poor. "Successful" meaning relief of all pain and symptoms in the back and leg. This apparently is what has taken place here.

The patient has had continued pain in the lower back, continued pain in the right leg. In fact, an increasing amount of pain in the right leg, requiring continued orthopedic care and treatment, requiring continued neurosurgical care and treatment, requiring further treatment and procedures, including the use of a particular type of electrical apparatus, something like a transistor radio which they attach certain wires to the back to attempt to decrease the amount of pain, also another operative procedure performed in a hospital under X-ray control known as a percutaneous rhizotomy, in which through the use of certain electrical needles and so forth certain nerve fibers in the joint of the spine are destroyed. The purpose of that is to help to decrease pain.

With these procedures, Mr. Chiarello has had a

minimal, if any -- minimal, if any, improvement, and has had continued pain in the back, numbness and weakness in the right leg and difficulty, of course, in performing normal and usual activities such as standing, walking, bending, lifting, driving a car, et cetera. Of course, he has not been able to return to work all this time. Because of the continued problems he has had, he was hospitalized, a new myelogram was performed and the findings of the new myelogram were suggestive and are suggestive of a deformity at the same level as before, the 4-5 level in the lumbar spine, this deformity being consistent either with a new herniated disc which can happen or the formation of scar tissue at the site of operation, causing further compression of this nerve, causing continued pain in the back and in the right leg.

Q Doctor, when you talk about adhesions and scar tissue, once adhesions and scar tissue are present in the spine can they be removed?

A No, sir.

Q Why not?

A Because they will reform all over again. There are certain operative procedures which you can do in which you will go in to try and remove the adhesions and to some extent you may be able to do it, although when you are dealing with

nerve tissue it's a very delicate operation. You may perform even more harm, more damage. But even if you do remove the scar tissue it has been everyone's experience who does this type of surgery that it will shortly reform again. So it's usually not even tried.

Q Doctor, do you as an orthopedic surgeon do the type of surgery that was performed on Mr. Chiarello in this case?

A Yes, in conjunction always with a neurosurgeon.

Q As an orthopedic surgeon, if you went into a person's spine and saw adhesions and scar tissue, would that be significant to you?

A Yes.

Q Would it be highly significant to you?

A Yes.

Q Would it, in your experience as an orthopedic surgeon, be as significant or more significant than the herniated disc itself?

A I would say equally significant.

THE COURT: Significant as to what?

Q As to the prognosis for recovery after this operation.

THE COURT: You are not testifying. You are not under oath. The doctor is the witness under oath.

You say significant, but you haven't told us the significance as to what.

THE WITNESS: Your Honor, I thought I made it clear before but I will reiterate. The formation of adhesions or the finding of adhesions and scarring of the nerve root indicates that whatever operative procedure you have performed you will never get a salutary or even reasonable result. It means that you are going to have a patient who may have a transitory short period of relief of pain, which may last weeks or maybe months, but no more, but sure as shooting, if you want me to use that terminology or I can use that terminology, this patient will continue to have trouble with that back and that leg for the rest of his life.

Q Doctor, would you tell us about your examination of January, 1976?

A Yes, sir.

When I examined Mr. Chiarello I found one significant finding is that he had gained a good deal of weight since I saw him the last time. He weighed approximately 260 pounds. He gained considerable weight since he had last been seen in '73. I noticed that he was in obvious pain and distress when he walked. He was using a cane and once again there was a marked right-sided limp. As he tried to walk there was a tendency for him to drag the right foot, indicating a muscle weakness in the right foot. In other words, he does not have the capability of bringing the foot up. When you walk

in a certain portion of the walking effort you have to bring up your foot from the level of the ankle. You bring up your foot and the toes. Due to the problems of the nerve roots here, he is unable to do this.

I found that there was a three inch long scar in the midline over the lumbosacral area, the lower back, the hollowing out of your back, which is the site of the surgery of December, 1973. There was some degree of tenderness and a muscular spasm in this area. There was restriction of all movement. All movement, asking him to bend forward, backward or side to side, all these movements were restricted and rather painful, and when he did attempt these movements, there was an increase of pain traveling into the right hip and buttocks and thigh, indicating once again involvement of the nerve root.

I found there was still some restriction of movement in the neck and upper back area and some tenderness in this area.

The ankle jerk, meaning the reflexes when you hit the ankle around from behind with a hammer, were absent on the right. There was weakness of the muscles of the foot and leg on the right side. There were several areas of numbness, loss of sensation and feeling in the right foot and leg. When I measured the extremity, the circumference of the legs, I

noticed on the right side there was an inch of atrophy, a shrinkage of the muscle, compared to the left side. This was obviously more than I had found in '73 when there was a half inch of atrophy.

Also, the test of lifting the leg, what we call the straight leg raising test, was markedly positive with pain and limitation of movement on the right side and somewhat also on the left side.

I took new X-rays of the patient at my office. These X-rays once again revealed this flattening of the lumbar lordotic curve, this particularly hollowing out which one expects to see in the low back. This would be compatible with a condition of spasm. There was some remains of the oily substance which was injected for the purpose of the myelogram into the spine. This could be seen on the X-rays.

THE COURT: I have one problem, Doctor. You used the word "flattening" and used the word "hollowing out." They seem to be contrary terms to me.

THE WITNESS: Yes, your Honor.

THE COURT: Show the jury what you mean.

THE WITNESS: Yes, your Honor.

Q Can you do it by X-ray?

A I can do it this way, too.

If one looks at a normal spine, meaning the small

of the back in a normal spine, normal person, from the side, profile, there is a normal hollowing out. In other words, concavity and convexity, the concavity towards the back, the convexity towards the front of the person. When there is an abnormal condition of spasm or tightening or contraction of the muscles, you don't see this hollowing out as much. It may be completely flat. The spine may look straight up and down, almost vertical, or it can be somewhat less of a hollowing out than one normally expects.

Q Doctor, based on your examination of January, 1976, would you tell us what your diagnosis and conclusions are?

A My diagnosis was that the patient still showed objective findings in relation to his injuries of 1972, and this would be in relation to the injuries to the upper back, the cervical spine, but more significantly to the lower back, where he had the injury of the slipped disc, herniated disc, and where he underwent the operative procedures that I mentioned, and that in spite of all the treatment that he received, in spite of all the operative procedures that he had undergone, he still was disabled, still showed signs and symptoms of a problem in the lower back with continued adhesions and compression of the nerve roots at the L-4-5 area on the right side, causing continued pain in the back, con-

tinued pain and weakness in the right leg, and that the compression at this time caused either on the basis of prior adhesions which were continuing to manifest themselves or even increasing at times, or the possibility of a new herniated disc at that area, which can happen also.

Q Now, Doctor, in your opinion, what, if any, treatment can Mr. Chiarello get medically that would help him in some way?

A The treatment that may help him, although such treatment would have to be recommended with great reluctancy, would be a new operative procedure, which would be a re-exploration, in other words, opening up the spine once again at that area where the original problem is and was, looking at the area of the disc again, looking at the nerve root and then perhaps trying to free up adhesions, the removal of a new disc, herniation or slippage, if it were there, and then the performance of a rather major operative procedure known as a spine fusion with the use of various grafting structures, meaning taking pieces of bone from other portions of his body, from his hip area and pelvis area, and putting those pieces of bone into the operative region of the lower back in an attempt to do this operation known as fusion, in other words, making one large solidified area and preventing movement of the various small joints of the lower back.

The reason this operative procedure is not recommended for this patient thusly is that it is a rather large, major procedure with a good deal of **modality**, meaning a long period of recovery. It is an operative procedure which may not be rewarding from the standpoint of functional improvement or relieving him of pain in any way because of the problem of the adhesions that were found originally and it may add greater complication with the forming of greater adhesions. Every time you are in there and manipulate the structures you will get more adhesions.

Q Doctor, if you were the orthopedic surgeon to decide whether or not to perform this spinal fusion, what would you do?

A I would not perform it.

Q Doctor, would you tell us about the type of pain that you get from scarring and adhesions inside the spine?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A The type of pain is, first of all, severe and continuing pain which may become progresively more severe as time goes by, and it's a pain both in relation to the lower back area, we are talking about the lower spine here, and in relation to the distribution of the nerve roots. In other words, the nerve roots are like an electrical system

and if the nerve is irritated and pinched in that area of the lower back, it can cause complaints anywhere where that nerve will travel subsequently from the hips down to the toes, causing the pain that he has had, that Mr. Chiarello is having, including causing other abnormal sensations of pins and needles, numbness, electrical shock problems, also causing muscle weakness, muscle atrophy or shrinkage, which he also has.

Q Doctor, the nerve roots in the lumbar spine, are they both motor and sensory nerves?

A Yes, sir, they are.

Q And could you tell me the size of the nerve roots in the lumbar spine as contrasted, say, to the nerve roots in a tooth?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

Q Incidentally, Doctor, what was your opinion as to the nerve roots that were affected by this herniated or slipped disc?

MR. SCHULTZ: Objection.

THE COURT: I don't know what you mean what his opinion was.

Q What nerve roots were affected, Doctor?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A The nerve root at the 4-5, between the fourth and the fifth lumbar vertebral body.

Q And what does that nerve root control with regard to the functions of the back and legs?

A It controls those areas of the leg below the knee, the outer and front portion of the leg, the outer and top portion of the foot and toes.

Q Is that an important nerve root?

A Yes.

Q Doctor, the operation called -- withdraw the question, please.

I note that in the Richmond Memorial Hospital and the other hospital there is a word in the complaint used in the diagnosis of severe "intractable" pain.

Would you tell the jury what that means?

A Severe is obviously severe. "Intractable" means unrelieved, in other words, it's a continuing pain which is unrelieved by the usual modalities that would relieve pain which could be either restriction of activity, resting of the part or the use of a strong analgesic or pain killing medicine.

Q Doctor, is the operation that was performed on Mr. Chiarello, the rhizotomy, a radical procedure for relief of

pain?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A I don't know if I could use the term "radical." It's one of the last procedures that you would use. In other words, it's about the ultimate procedure in relief of pain. It's a procedure which is used frequently in this particular type of a case or any type of intractable pain where there is no control of the situation.

Q And if that procedure doesn't work, Doctor, is there anywhere else you can go as a doctor to relieve Mr. Chiarello's pain?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q Do you know of any other procedures beyond the rhizotomy except for medication?

A No, sir, none at all.

Q As an orthopedic surgeon, what would you do to relieve the symptoms you found Mr. Chiarello to be suffering with when you saw him in January, 1976?

A I would only offer him a program of use of some form of analgesics, pain killing medicine, within reason so as not to prevent other problems which may take place with prolonged usage of pain killing medicines, a program

of some form of exercise in an attempt to keep the body mobile; the use of a well made spinal brace, when he is up and around, and from time to time during periods of extreme exacerbation of pain, in other words, when he is severely in pain, to stay in bed for several days.

Q Doctor, in your opinion as an orthopedic surgeon, would the use of a swimming pool aid Mr. Chiarello's condition?

A Exercise of that nature, swimming pool exercise, swimming is an excellent form of treatment in these sort of frustrating situations where you cannot do anything operatively or so-called constructively to treat a patient. It's a worthwhile form of physical therapy as it keeps a certain degree of flexibility in the body, arms and legs without having the effect of gravity. In other words, you are held up by the buoyancy of the water and is frequently recommended by us as a form of treatment for back problems.

Q Doctor, since you first saw Mr. Chiarello, would you say his condition had improved, remained the same or had gotten worse?

A I would say, if anything, when I saw him in January of '76 he was obviously worse than he was when I saw him in June, 1973.

Q Doctor, I want you to assume that on June 30, 1972, Mr. Chiarello was a man of about 33 to 34 years of age and

that he was employed regularly as a terminal superintendent by Universal Terminal and Stevedoring Corporation, a job that called for both manual and clerical labor, that he had been working for Universal as this type of superintendent since 1967 and that prior to that he had worked as a pier superintendent for many years; that he had never sustained injuries prior to this in his life either playing football, indulging in sports, through accidents or disease; that on that date, while he was stopped behind another vehicle on the Bayonne Bridge, his car was struck in the rear by a bus with enough force to cause the front seat of the car to collapse and him to go backwards on his back, that the car was propelled into the car in front of him a distance of some ten feet with an impact which threw the plaintiff back up into the air again, striking his head on the visor and draping him over the steering wheel, that after the accident he was white and shaken, that he went home and that he came under the care of Dr. L. Jackson Spitz who found injuries to his back and neck and other portions of his body, that he then went to a Doctor Rothman, a Dr. Urs, a Dr. Leventhal, Dr. Frank, Dr. Moreno, he went to the Richmond Memorial Hospital in Richmond, Virginia, where a myelogram was taken which myelogram was positive at L4-L5 and that in December of 1973 a hemi-laminectomy was performed at the

Golden Isles Hospital in Hallandale, Florida, for the removal of a herniated or slipped disc.

Doctor, with reasonable medical certainty were the injuries the plaintiff sustained in this accident due to the accident?

A Yes, they were.

Q With reasonable medical certainty, Doctor, was the disability that plaintiff claimed to have had, that he has not been able to go back to work since this accident due to the injuries he sustained in this accident?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Yes, they were.

Q In your opinion, Doctor, will Mr. Chiarello ever be able to return to any form of gainful occupation?

A No, sir.

Q Do you have your X-rays with you, Doctor?

A Yes, sir.

Q May I see them, please.

(Handed to Mr. Lassoff)

MR. LASSOFF: May I offer these in evidence?

MR. SCHULTZ: Objection.

THE COURT: Why?

MR. SCHULTZ: Number one, I haven't seen them. I don't know when they were taken.

THE COURT: The witness has testified that he took them in January of 1976.

MR. SCHULTZ: May I see them, please, your Honor, the ones that are now being offered?

MR. LASSOFF: Your Honor, I don't understand this. Mr. Schultz saw these X-rays this morning. I don't understand it.

THE COURT: He has a right to make an objection. His first objection was he didn't know when they were taken. The witness testified he took them in January, 1976. He now asked to look at them. You may look at them.

MR. SCHULTZ: I only looked at the first one before we started this morning.

THE COURT: Take a look at them.

MR. SCHULTZ: May I ask some questions on these, your Honor?

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. SCHULTZ:

Q Doctor, I show you these X-rays here --

A Yes, sir.

Q -- were these taken in January of '76 or May of '73?

A This one is January 5, '76; this one is May 14, '73 --

THE COURT: Separate the '73 from the '76.

THE WITNESS: Yes, sir.

A These are '73 X-rays and these are '76.

Q Which ones are these?

A This is '76 and this is also '76.

Q Were both sets of X-rays here this morning, Doctor?

A Oh, yes, in that envelope. They haven't been removed.

MR. SCHULTZ: Now which ones are we offering?

MR. LASSOFF: We are offering both, your Honor.

MR. SCHULTZ: My point is he offered the ones of '76. I hadn't seen those because I looked at the first one this morning that was dated May of '73.

Can we establish did he take both of these X-rays, both sets, or were they taken by somebody else, Doctor?

THE WITNESS: Do I understand his question?

THE COURT: Yes.

THE WITNESS: These X-rays were taken at my office in May of '73 and in January of '76 by my X-ray technician under my personal direction and supervision.

MR. SCHULTZ: I have no objection, your Honor.

THE COURT: All right.

(Plaintiff's Exhibit 8 received in evidence.)

MR. LASSOFF: Mr. Schultz may inquire, your Honor.

xxx

I have finished.

THE COURT: You may proceed.

MR. SCHULTZ? Do you want me to start right away, your Honor?

THE COURT: Yes.

CROSS EXAMINATION

BY MR. SCHULTZ:

Q Dr. Friedman, you and I have met before, have we not?

THE WITNESS: Do I answer his question, your Honor?

THE COURT: Sure.

A Yes, sir.

THE COURT: You answer any question he asks unless Mr. Lassoff objects.

A Yes, sir.

Q Doctor, you were asked on the first occasion to examine Mr. Chiarello by a lawyer, is that right?

A Yes, sir.

Q And that lawyer was a firm of Heckerling and some others, is that true?

A I guess so, yes, sir.

Q Have you examined other patients and other people who were making claims in behalf of those lawyers?

A From time to time, yes, sir.

Q Doctor, the lawyers that sent Mr. Chiarello to you are lawyers who normally represent people who are making claims, isn't that true?

A I think so, yes.

Q Doctor, you examined other people in their behalf who were making claims, is that true?

A I have from time to time, that's correct.

Q Doctor, you also examine for other lawyers who represent people who are making claims, isn't that true?

A From time to time, that's correct.

Q Doctor, and you come to court and you testify in behalf of these people and the lawyers who are making claims, isn't that true?

A On infrequent occasions, I do.

Q And you render reports to these lawyers who send these people to you, do you not?

A That's correct.

Q Would you tell us, sir, in the last, say, perhaps four or five years how many people who are making claims do you examine in behalf of lawyers in the course of a year?

A Within one year? Perhaps 25 or 30.

Q On an average, then, somewheres around two to three a month, isn't that right?

A Approximately.

Q And you render reports to the lawyers who send those people to you, isn't that true?

A That's correct, sir.

Q Now, Doctor, you also told us that you worked at the United States Public Health Service on Staten Island, isn't that true?

A Yes, sir, I did.

Q Doctor, is that a hospital or a treatment center for the Merchant Marine people?

A It is.

Q Seamen?

A Yes, among others.

Q Stevedores?

A No, not stevedores.

Q Do they occasionally come in there?

A Infrequently, only if there were a severe emergency and that happened to be the closest hospital.

Q But it is basically for the maritime service?

THE COURT: Basically for seamen.

THE WITNESS: Seamen, Coast Guard and some other federal employees.

Q Doctor, did you know the Chiarello family from the waterfront at all?

A I never met Mr. Chiarello until he entered my office in May of '7_.

Q I am asking --

A I don't know anybody on the waterfront other than those infrequent occasions when I may make a cruise ship and I see a fellow I hand my suitcase to when I get out of the taxicab.

Q Have you had any relationship with other stevedores who had been referred to you to make examinations?

A Not to my recollection at this time.

Q I take it, then, sir, that you did not know Mr. Chiarello's relatives who may or may not have been the owners of American Stevedores?

A I am afraid I don't know anyone at American Stevedores. I wouldn't even know where the office was.

Q All right. Doctor, did you look --

MR. SCHULTZ: May I have the Golden Isles Hospital record, please?

MR. LASSOFF: Certainly (handing).

Q Did you review this Golden Isles Hospital record, sir?

A I believe I did, sir.

Q Did you look at the operative report?

A Yes, sir.

MR. SCHULTZ: Excuse me, your Honor, while I find it.

(Pause)

Q Would you tell us, Doctor, what a right hemi-laminectomy is?

A It's an operative procedure or operation where the doctor removes -- opens up the spine, here it would be on the right side, there is a right and a left, this is on the right side, and opens into the spine, removing certain bones and ligaments in order to approach the disc area and the area of the nerve roots.

Q A hemi-laminectomy, what does hemi mean to you?

A Hemi means half.

Q And in this case, sir, did you tell us on direct examination that the entire disc was removed?

A That's correct, sir.

Q Sir, when a hemi-laminectomy is done, does that mean half?

A No. A hemi-laminectomy, if I may be allowed to explain it.

Q Just answer it.

A I can't answer it unless I say what a laminectomy is. A laminectomy does not have anything to do necessarily with the procedure of removal of a disc. The removal of a

disc is the removal of a disc, sometimes called a discectomy. A laminectomy is an opening and removal of a portion of the bone known as the lamina which is overlying the disc and the nerves. When you do a hemi-laminectomy you remove half the lamina. A lamina is a piece of bone approximately an inch and a half long by three-quarters of an inch wide, and this is sort of the bony roof over the spinal cord. When I do a hemi-laminectomy you remove half of that piece of bony known as the lamina, but it has nothing to do per se with the actual removal of the disc.

Q Doctor, would you look through this operative record and tell us does it say anywhere in there, if you could show it to me, sir, where the disc was removed?

A There is a sentence here, if I may be allowed to read it.

Q Please read it.

A "We continued the mobilization of the L-4 nerve root and retracted it carefully. We then performed a disc excision."

"Excision" means removal.

"A disc excision using curets."

That is a type of instrument like a little spoon that you use to scrape out the disc material -- "as well as pituitary rongeur."

Pituitary rongeur is an instrument that sort of bites out the rest of the disc material when you are going between bones.

"And excised approximately 8 cc. of degenerative disc material."

In other words, the stuff -- I am sorry -- the material that is removed, the disc, is actually put into a little container and the operating doctor, the surgeon, measured this to be the equivalent of 8 cc.

CC. is a cubic centimeter.

Q Doctor, did they also remove a portion of the nucleus pulposis?

A The nucleus pulposis is a portion of the disc. If they removed 8 cc. of disc they had to remove the nucleus pulposis.

Q Doctor, with relation to that operative procedure, was there scarring and adhesions in and about the nerve root?

A Yes, there was.

Q Did the surgeon -- was there a rent in the dural sleeve?

A I don't know about the rent in the dural sleeve, but to answer the first question --

Q Would you look -

THE COURT: You have two questions.

MR. SCHULTZ: I will withdraw it.

Q Doctor, was there scarring and adhesions at the L4-L5 area?

A Yes, there was.

THE COURT: Do you mean did they find it when they went in?

THE WITNESS: Yes, they did. That's what I mean.

Q Doctor, can you tell us for how long a period of time that scarring or the adhesions were present?

A It was present --

Q How long it existed?

A How long it existed? It existed sometime after 1972, when he had his slipped disc situation.

Q Doctor, could it have preceded that?

A No, sir.

Q In your opinion it could not?

A No, in my opinion, no.

Q Doctor, if Dr. Larry Kaplan -- do you know him?

A I heard of him. I don't know him.

Q If he had rendered an opinion he could not state when those scar tissues and adhesions came into being, would you agree or disagree with him?

MR. LASSOFF: Objection, your Honor. There will be no such testimony and there has not been. This is not

going to be any evidence.

THE COURT: That's what you say.

MR. LASSOFF: There is no such opinion and there is no basis for him to make an opinion on nothing but what Mr. Schultz says.

THE COURT: It is not what Mr. Schultz says. I sustain the objection for other reasons. He is giving his opinion. He is not commenting on what other doctors say or may say.

Q Doctor, did you know that on prior occasions Mr. Chiarello has testified that he played tackle in a high school football team?

A I didn't know that, but it wouldn't be surprising.

Q Did you know that he had testified that he had received blows to his neck and his back; do you know that?

A No, sir.

Q Do you know, sir, that he had testified that he had lifted weights from 50 to a hundred pounds and had been in the process of sliding freight doors on freight trains; did you know that?

A No, sir.

Q Sir, is it possible to have an injury to a disc occasioned as a result of twisting or blows that did not manifest itself until some later date?

A No, sir.

Q I want you to look in the operative report and tell me, sir, while the surgeon -- if you can tell from there -- while the surgeon was operating or working at the nerve root whether or not there was not a rent made in the dural sleeve?

A Yes, there was a small -- he describes here that the nerve root was seen to be markedly adherent with scar and frayed. In other words, the nerve root was frayed. And there was a small rent in the dural sleeve and this was closed with a single 40 silk suture.

THE COURT: Does that mean this occurred during the operation or existed before the operation?

THE WITNESS: I don't know, your Honor. It could have taken place either before or during the procedure. The description here is not quite clear. It's possible that during the time that the surgeon was trying to free up the nerve from the disc, since there were these adhesions, scar tissue, he may have created this small opening in the dural sleeve.

Q Doctor, the dural sleeve is the protective area around the nerve, isn't that true?

A Yes, sir. It is like an overcoat over the nerve, membrane.

Q Doctor, I want you to look at the roentgen reports which I think are back further. Perhaps I can help you.

A Maybe they are before.

Q I really don't know.

Doctor, I show you this plaintiff's exhibit, whatever it is, I don't remember the number -

THE COURT: Isn't it on the front of it?

MR. SCHULTZ: 5.

A Yes, sir. This is a report of the myelogram.

Q Doctor, I just asked you to look at it.

Doctor, you have testified on many occasions in court, have you not?

A No.

THE COURT: I don't understand the point of the question, not on many occasions. Put a question to the witness.

MR. SCHULTZ: I did put a question. I asked him to look at it.

THE COURT: Now your next question.

MR. SCHULTZ: He started to --

THE COURT: Next question.

MR. SCHULTZ: Thank you, your Honor.

Q Doctor, was the myelogram done of the cervical area?

A Yes.

Q Does that myelogram show that there were no abnormalities in the cervical area?

A That's correct. There was no evidence of extradural or intradural abnormalities.

Q Doctor, may I have that a moment, please?

Did they also take X-rays of the cervical spine, sir?

A That's correct, they did.

Q Doctor, did they say that there was normal alignment of the vertebral bodies of the cervical spine?

A Yes, sir.

Q Did they mention any loss of the curve?

A No, sir.

Q Did they mention any loss of curve at all?

A No, sir.

Q Doctor, when X-rays are taken, is it possible that a patient can be positioned in such a way when you take the X-rays so that the curve is minimized or made to disappear?

A No, sir.

Q In any event, Doctor, this hospital record does not indicate the loss of a curve, does it?

A No, sir.

Q It doesn't indicate any narrowing of the inter-

vertebral spaces, does it?

A No, sir.

MR. LASSOFF: May we know what we are talking about, the cervical spine or the lumbar spine? I thought we were talking about the cervical.

We are referring to the cervical spine now?

MR. SCHULTZ: Yes.

THE COURT: The cervical spine is a portion right below the neck?

THE WITNESS: From the base of the skull down to the level of the shoulders.

Q How many vertebrae are there, Doctor?

A Seven.

Q Doctor, with relation to the lumbosacral spine taken in the hospital, did they show any narrowing of the spaces?

A Not according to this report.

Q Doctor, that's the hospital record, is it not?

A It is a hospital record.

Q Doctor, it doesn't show -- that roentgen report or radiographic report does not show any narrowing of the spaces, does it?

A It does not show any narrowing nor does it mention any narrowing, but it's a report, it is not the X-rays.

Q Does it mention any loss of the curve?

A No, it does not.

Q What percentage of your practice, Doctor, would you say, or percentage of your income comes from furnishing reports and examining patients in behalf of plaintiffs' lawyers?

A I don't know, but I would imagine quite small.

Q What percentage?

A I couldn't even figure that out.

Q Could you tell us what it would be in the course of a month, the average month, what you would earn from examining plaintiffs for lawyers?

A I don't know that.

Q Doctor, I will work with one copy and you can work with another. You can use a court exhibit, if you will, sir.

Doctor, with relation to the lumbosacral spine as reported in the X-ray report in the Golden Isles Hospital in December of 1973, did it indicate that the vertebral bodies were intact and in anatomical alignment?

A That's what the report states.

Q Doctor, what does that mean when the vertebral bodies are intact and in anatomical alignment? What is the significance of that to you?

A It means that there is no evidence of any fracture

or dislocation or displacement of one vertebra in relation to another vertebra. The fact that the X-ray doctor --

Q Doctor, just answer that question, please.

A I can't answer it unless I answer it the way I answer it. If you are going to stop me then I will not answer the question.

Q Doctor, with relation to the report that the interspaces are well preserved, would you look at that, sir?

A Yes, sir.

Q Doctor, the interspaces between the vertebra are maintained to some extent by the discs, are they not?

A Yes, sir.

Q And emanating from between the vertebra, Doctor, one on top of the other, are various nerves, do they not come out?

A Yes.

Q And they come out through an opening known as a foramen, do they not?

A Yes, sir.

Q Doctor, if the vertebra should compress or go down, it impinges on the nerves, does it not?

A It can, yes.

Q And in this case here, Doctor, according to this report -- withdrawn.

If there is a compression or a narrowing of the intervertebral spaces it may lead you to the conclusion there is an impingement or pressing on the nerves, isn't that true?

A It can, yes, sir.

Q Doctor, in this report did it indicate that the spaces were intact?

A It did.

Q Does that indicate to you, according to that report, that there was no impingement on the nerves?

A Obviously not, because there is a myelogram that showed impingement of the nerve --

THE COURT: He is only asking about this report.

THE WITNESS: As far as the X-ray report, you cannot determine whether there is impingement of the nerve on this X-ray.

Q But there was no narrowing of the spaces?

A That's correct.

Q Doctor, with relation to the cervical spine there was a meylogram performed, isn't that true?

A Yes, there was. I think this was sometime before this hospitalization.

Q Doctor, would you look at it? Is it dated December 3, 1973?

A Yes, December 3, 1973, there was a lumbar and cervical myelogram.

Q And he was in the hospital at that time, was he not?

A Correct.

Q And he was operated on I think on December 5th, wasn't he?

A That's correct.

Q Doctor, what nerves do you say come out of the L4-L5 region at the scene of this operative site?

A The 4-5 root.

Q Does it have a name?

A It has no specific name. It's a portion that eventually becomes the sciatic nerve. A portion of the sciatic nerve is made up of the 4-5 root, with the 4-5 root.

Q Doctor, does the 4-5 nerve root come out on both sides of the vertebra?

A Yes, one on the right and one on the left. It's a mirror image, symmetrical.

Q Was this operative site on the nerve root where the tear was made into the dural sleeve, was that on the right?

A Yes, sir.

Q Not on the left?

A The operation was on the right and the nerve root that was involved and visualized was on the right.

Q Doctor, was the lamina on the right side of this man's vertebral bodies removed?

A That's right.

Q That's what the hemi-laminectomy is, is that right, Doctor?

A Yes, that's correct.

Q Was there anything done for the left side?

A No, sir.

Q Did the myelogram of the lumbar spine show any defect on the left?

A The conclusion of the doctor who looked at the myelogram was that there was evidence of extradural defect in the region of L4-L5 on both sides, in other words, the right and left side.

Q Doctor, I asked you about the myelogram report.

A I answered the question about the myelogram report.

Q The report indicated there was less filling on the left side?

A That's correct.

Q Doctor, the filling is visualized by the pantopaque

being passed through the spinal column, isn't that true?

A That's correct.

Q And if there is less filling on the left side it indicates that none of the -- less pantopaque is going into the left than on the right, isn't that true?

A Yes, sir.

Q And that leads one to believe that there was an opening on the right of a greater portion than on the left?

A It could, yes.

Q And, in any event, Doctor, no operative procedure was taken on the left, is that true?

A That's correct.

Q Doctor, if there is nerve root involvement on the right side, L4 and L5, will it manifest itself on the right or on the left?

A On the right.

Q What?

A On the right.

Q It does not cross over?

A Infrequently.

Q How many times did you talk to Mr. Lassoff before you testified here today?

A I spoke to him -- he called my office yesterday to tell me what time to be here and I spoke to him this morning

when I came in for about a minute and he told me I was somewhat early.

Q I just asked you how many times did you talk to him.

A Twice.

Q Twice?

A Yes, sir.

Q Did you talk to him at any other time?

A No, sir.

THE COURT: In the last three months?

THE WITNESS: I spoke to him in January, yes, sir.

THE COURT: That is what he is asking. He is trying to find out any time you spoke to Lassoff.

THE WITNESS: He mentioned before I --

THE COURT: Doctor, he merely asked you how many times you spoke to Lassoff about this case. That means every time.

THE WITNESS: Three times.

Q Once in January, once on the phone and once when you came here this morning?

A That's correct.

Q Doctor, you expressed an opinion that this man could not, in your opinion, return to his occupation as a stevedore, is that correct?

A Yes, sir.

Q Doctor, in your opinion, can this patient perform sedentary occupations?

A To a very limited extent. What I mean by that is a sedentary occupation means a job where you are sitting down. Now, while on one hand it would be impossible because of his medical condition to do any job which involves standing, walking, bending and lifting, on the other hand, it is as much a problem for him to do a job where he has got to be seated for prolonged periods of time.

Q But he could do some sedentary work if he was permitted to get up every now and then and walk about, isn't that true?

A Sedentary work for a few hours a day perhaps he could do.

Q Doctor, did you conduct a physical examination of this man?

A In relation to his orthopedic problems, yes, sir.

Q Did you take his blood pressure?

A No, sir.

Q Would you look on the admission chart there, Doctor, and tell us how much this man weighed when he went into the hospital?

THE COURT: Is that Exhibit 5?

MR. SCHULTZ: Yes, sir, the same one.

A He weighed 240 pounds.

Q At that time?

A Yes, sir.

Q In December of '73?

A Correct.

Q Doctor, did you know that this man had hypertension?

A No, sir.

Q Did you know that he had it for a considerable period of time?

A No, sir.

Q Did you know, Doctor, that this man had a pre-existing hiatus hernia?

A No, sir.

Q Do you know that this man smokes three to four packs of cigarettes a day?

MR. LASSOFF: Objection, your Honor, the word "smokes"?

THE COURT: Sustained.

Q Doctor, I want you to look at the report of the consultant, Dr. Treiber, right in this hospital record.

A Yes, sir.

THE COURT: What do you want him to do with it?

MR. SCHULTZ: I want him to look at it.

THE COURT: Read the whole thing?

MR. SCHULTZ: If he will.

THE COURT: All right.

(Pause)

A Yes, sir.

Q Doctor, does that report, which is a part of the medical record that has been placed into evidence by the attorney for the plaintiff, does that indicate to you that the plaintiff has hypertension?

A It mentions that, yes, sir.

Q And does it indicate to you in social history that the patient smokes three to four packs of cigarettes a day?

MR. LASSOFF: Your Honor, I wasn't objecting to that. I was objecting to the word "smokes" now. I was objecting to the present tense. I concede the hospital record says that.

THE COURT: I assume the doctor would say he doesn't know he smoked three to four packs a day.

THE WITNESS: No.

Q Were you advised as to that?

A No, only here in the chart.

Q You didn't see that when you examined him, did you?

A No, I don't recall seeing it.

Q Doctor, does this report also indicate that the mother -

that his mother had high blood pressure?

A Yes.

Q And that his father has a heart condition?

A May have a heart condition.

THE COURT: What is that?

THE WITNESS: May have, m-a-y.

Q Doctor, what would you say as to a man's blood pressure that is 140 over 104?

A Slightly high for a man of his age, but not unusually high for a man of his build. He is big, he is overweight.

Q Obese?

A Overweight. This frequently leads to a slight elevation of blood pressure. Blood pressure, incidentally, of 140 over 104 isn't excessively high. It's somewhat high but not excessively.

Q One is the systolic rate, isn't it?

A The 140 is the systolic, the 104 is the diastolic.

Q Isn't the diastolic high in this man?

A Yes, it is.

Q Doctor, in your opinion, would overweight, hypertension, the high diastolic rate, would that indicate -- and a history of his mother with high blood pressure, the possibility that his father has a cardiac condition, would you venture a medical opinion as to whether or not this man's

life expectancy may be less than someone who doesn't have these problems?

A I wouldn't make such an opinion. That is not my field.

Q That is not your field of expertise?

A I just said that, yes, sir.

Q Doctor, what about the history of smoking three or four packs of cigarettes a day, do you have any opinion as to that, sir?

A Opinion in relation to what?

Q As to what effect it might have on his life expectancy?

A I don't know.

Q Doctor, you told me -- you told us -- I am sorry -- you told the Court and jury that there was an absence of the ankle jerks, is that right?

A Yes.

Q Doctor, this absence was bilateral, was it not?

A In January it was, yes, sir, January, '76.

Q What was it in June of '73?

A In June of '73 -- May of '73 is what you mean, May 14, '73.

Q You wrote the report in June, isn't that right, Doctor?

A I don't know when I wrote the report. I don't write the reports. The report was typed in June. I saw the man on May 14, 1973. The reflexes at that time were that the right ankle jerk or reflex was markedly depressed, what we call a zero to a one plus, and after several slight responses the right ankle jerk was completely absent. In other words, the ankle jerk could be exhausted. When you hit it with a hammer a few times, it was completely gone.

Q Doctor, you found in January of '75 that both of them were absent?

A That's correct.

Q Doctor, did you find any tinnel sign at all?

A No.

Q You found none?

A No.

MR. SCHULTZ: I have no further questions.

THE COURT: Redirect?

MR. LASSOFF: Just one minute, your Honor.

REDIRECT EXAMINATION

BY MR. LASSOFF:

Q Doctor, a myelogram is an X-ray that's taken after the injection of dye into the spine, is that correct?

A That's correct.

Q When those special X-rays are taken, did they reveal

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a defect of his lumbar spine?

A Yes, they did.

Q What was that defect?

THE COURT: There are so many X-rays and myelograms, I think you have to specify what you are talking about. I gather you are talking about the Golden Isles Hospital report.

MR. LASSOFF: Yes, your Honor. I am sorry.

THE COURT: At which time there were both X-rays and myelograms taken.

THE WITNESS: Yes.

Q I am referring to Plaintiff's Exhibit 5, the Golden Isles Hospital record. Did the myelogram taken in that hospital of the lumbar spine reveal by X-ray defects in the lumbar spine?

A Yes, it did.

Q Will you tell us what those defects were?

A The defects were a filling defect, in other words, the dye did not fill out the areas completely at the 4-5 level, the space between the fourth lumbar vertebral body or bone and the fifth lumbar vertebral body.

Q Is the purpose of a myelogram in part to determine where the herniated or slipped disc is?

A Yes, sir.

Q And when you have that lack of filling out, in that

a blockage? Is that called a blockage medically?

A Yes.

Q Does that pinpoint the area of the herniated disc?

A It does.

Q Doctor, you have heard something about Mr. Chiarello having high blood pressure and some history of hypertension which I think he has had for some two or three years before the accident. Would it be significant for you to know that a history of his father given in that record and his mother are both alive over 65?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A Yes, it would be.

Q Would that indicate that the family history of hypertension is not significant with regard to life expectancy?

MR. SCHULTZ: Objection. The man has stated he is not an expert in that field.

THE COURT: Let him answer it again.

A It would be anticipated that whatever hypertension or so-called heart disease existed in the family would still be compatible, obviously, with long life.

Q And people can live for a long period of time with hypertension, with heart disease, with any number of symptoms, can they not, Doctor?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Yes, they can.

MR. LASSOFF: Thank you very much, Doctor.

RECROSS EXAMINATION

BY MR. SCHULTZ:

Q Doctor, how much are you being paid to come here today and testify?

THE COURT: Sustained. I thought you had some questions on issues in this case.

MR. LASSOFF: I have no objection to that answer, your Honor.

THE COURT: What I want to find out here is counsel for the plaintiff refers to the myelogram that was taken at the Golden Isles Hospital and counsel for the defendant refers to the X-ray report taken at the Golden Isles Hospital. As I gather it from your testimony, the findings are inconsistent?

THE WITNESS: No, they are not.

THE COURT: Because the X-ray report says the vertebral bodies are in alignment and proper station, and the myelogram indicates a blockage on one side. You say those are not inconsistent?

THE WITNESS: No, your Honor, if I may explain.

THE COURT: Tell us why not.

THE WITNESS: Obviously the blockage which is due to the disc being out of place is not a hard structure, it is not a bone. Normal X-rays only show bones or calcium deposits. The fact that there is a disc out of place, a herniated disc, would not show up on an ordinary X-ray that was taken and the spaces may be perfectly normal. This is not incompatible with having a huge disc which would show up on a myelogram. In other words, to make it very simple, you can have normal plain X-rays and have a horribly normal -- abnormal myelogram. That can take place the very same day.

THE COURT: All right. Thank you.

(Witness excused)

THE COURT: We will adjourn for lunch. Would you return at two o'clock, please.

(Luncheon Recess)

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AFTERNOON SESSION

March 4, 1976
3:00 p.m.

(Jury present)

THE COURT: Ladies and gentlemen of the jury, I am sorry that we have had this delay, but there is a jury upstairs which was involved in a three-week trial over which I presided and they are still out in their deliberations. It's a criminal case. So under our rules they get preference. We have taken care of their problem for the time being. We hope to finish the day here.

Next witness.

MR. LASSOFF: With Mr. Schultz's permission, may I put Dr. Leone on now?

THE COURT: Yes.

S A M U E L P. L E O N E, called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. LASSOFF:

Q Dr. Leone, are you a physician duly licensed to practice medicine in the State of New York?

A Yes, sir.

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Q Are you a physician duly licensed to practice medicine in the State of Florida?

A Yes, sir.

Q Do you maintain an office presently for the practice of your profession?

A Yes, sir.

Q And where is your office located?

A 2100 East Hallandale Beach Boulevard, Hallandale, Florida.

Q Dr. Leone, would you tell the Court and jury your professional training, background, specialities, your background as a doctor?

A Received my Bachelor of Science Degree at Long Island University, University of Bologna, Italy, Medical School, one year internship at the Brooklyn Hospital, one year residency in general surgery at the Brooklyn Hospital, two years of orthopedic surgery at Downstate, State of New York, one year as chief resident in orthopedic surgery Downstate, State of New York, was consultant to the Cerebral Palsy Foundation of Crippled Children in New York and the Arthritis Foundation of New York. Practiced in New York for approximately five or six years and then moved to Florida approximately four and a half years ago.

Q Is your practice in Florida confined to any particular

field of medicine?

A Orthopedic surgery.

Q Did there come a time, Dr. Leone, where Thomas Chiarello came into your professional care?

MR. SCHULTZ: At this time, your Honor, may we have a side bar?

(At the side bar)

MR. SCHULTZ: If your Honor please, at this time I am going to respectfully object to the testimony of Dr. Leone. I have no reports from Dr. Leone. None were ever furnished to me. The only thing I have had actually is the hospital authorization and, of course, the review of the --

MR. LASSOFF: I have never had a report, Judge. I still don't.

THE COURT: He doesn't have any reports. They can't give it.

MR. SCHULTZ: I will object, though, anyway.

THE COURT: His name is listed on the pretrial order.

(In open court)

Q Doctor, when for the first time did you see Mr. Chiarello?

A August 13, 1973.

Q And was that in your office in Hallandale, Florida?

A Yes.

Q What, if anything, did you ascertain at that first meeting with Thomas Chiarello?

A A history of Mr. Chiarello being involved in an accident on June 30, 1972, wherein he was struck in the rear and sustained injuries to his neck and back area, and at the time Mr. Chiarello had reports from a Dr. Friedman and a Dr. Lanier. I took the history, examined Mr. Chiarello and found evidence of cervical sprain to the neck and a disc protrusion of the lumbo and lumbosacral area.

Q What did you do with Mr. Chiarello after you examined him?

A He had already received good conservative therapy and good observation with proper treatment. I explained to Mr. Chiarello that the only way of any attempt of relief would be surgery. He had fears of surgery. He has had these fears up until the time we operated on him. But we again tried conservative therapy, physiotherapy, medication, and repeated everything he had done to a point where he was just intolerable with pain, weakness and neurogenic problems that neurosurgeons were called in and there was no doubt that surgery was indicated and surgery was performed.

Q When you say neurosurgeons were called in, can you tell us the specific neurosurgeon called in?

A Dr. Steve Gervin, neurosurgeon in Florida, was asked to consult on Mr. Chiarello. He did so. He, himself, did a myelogram. On examination together there was no doubt in our mind surgery was definitely indicated.

Q Doctor, when this surgery was performed were you present during the operation?

A Yes, I scrubbed and operated with Dr. Gervin.

THE COURT: When was this performed, Doctor?

THE WITNESS: It was performed -- be patient with me -- on 12/2/73.

Q Is that the operation or the myelogram?

A Laminectomy.

Q When this operation was performed and you went into Mr. Chiarello's spine, did you find a herniated disc?

A Yes.

Q Did you find something in addition to a herniated disc?

A We found all the components of a herniated disc of long standing of Mr. Chiarello's history with the scarring that is seen around the disc area and the nerve roots coming out of the spaced area.

Q Could you describe this operation that was performed on Mr. Chiarello?

A Because of the size of Mr. Chiarello, he was placed

in a rather sided atmosphere to the operating table rather than flat down. The approach was made along the spinous processes right at the base of the spine where you feel the bumps of the spine. The incision was made. We carried it down through the fascia, separated both sides and looked for a level of protrusion. When we found the level of protrusion, we found an abundance of scar tissue, we found nerve root swelled, the nerve was swollen, we found pressure right underneath this. It was difficult because we did strip a nerve of Mr. Chiarello and we did enter the dura to clean out and protect the motor and sensory nerves from any further damage.

Upon entering the disc space we had full view of the herniated disc, which is a gelatinous type of material that just bulges out and with the proper instruments we cleaned out both sides. We then examined for any defect further up in the dura or lower in the dura. We examined the nerve roots around the area and we then proceeded to examine the stability of the back and at this point on examination we felt that enough surgery was done, that we did get the disc out, and we closed the patient. By closing him, I mean we sutured the proper layers. Then the patient was placed on bed rest.

Q Doctor, is there a name for the operation you per-

formed?

A Yes. It's a laminectomy and excision of nucleus pulpolsis.

Q Is it nucleus purposes that the gelatinous material inside the disc?

A The fibrous fibrogelatinous material, yes.

Q Doctor, when you went into Mr. Chiarello's spine and saw this marked adhesion and scarring, did that indicate to you anything as to what the result of your operation was going to be?

A Yes. We had doubts as to a good result. We were hoping for a fair result after seeing the amount of scarring and the amount of time and probing that we had to do to clear it away to get to the disc itself, and the nerve -- the nerve roots of L4-L5 are the nerves that come back from the spine into the buttocks, into the legs, they were swollen. They were tampered with with scar tissue. They were sick, they were ill.

Q Doctor, did Mr. Chiarello continue under your care after this operation?

A Yes. Immediately postoperative, Dr. Gervin and I visited Mr. Chiarello in the hospital as a joint team and then he was under the care of my office and Dr. Gervin's office. Dr. Gervin primarily for neurological evaluation and

my office primarily for neurological and rehabilitative purposes.

Q Did there come a time when a different method of therapy was tried with Mr. Chiarello?

A Yes. Mr. Chiarello did the reversal of what a patient would like as a result, or a doctor. He started to go downhill with the same neurological, the same type of pain, the same type of findings as he did prior to surgery. We concluded that either the scar tissue was reforming, tightening down again on the nerves that were already damaged and/or a new herniated disc from the fulcrum now -- you know, the cushions of the spine, if you take one disc out you are now putting the brunt of the cushion effect on the spine on a disc higher or a disc lower. You are removing one of the cushions off the side of a pool table and the other cushions are going to bounce harder to get it off.

So we then proceeded with further examinations. We did electrical studies. We did myelograms.

Q Doctor, may I stop you for a moment. Before the additional myelograms were taken, did there come a time when some sort of a machine, a transcutaneous stimulator, was ordered?

A Yes. Dr. Gervin was doing some work with the FDA and the University of Miami --

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MR. SCHULTZ: Objection. I move to strike.

THE COURT: Sustained.

Q What you know.

A An electrical stimulator box was ordered for Mr. Chiarello, and this was placed as a portable unit on his back, and this was designed to relieve pain in the nerve fibers.

Q Incidentally, before that electrical stimulator was ordered, had Mr. Chiarello's pain returned in his back and leg?

A Yes.

Q Did there come a time when this electrical stimulator did not do the job it was intended to do?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Yes.

Q And at that time was Mr. Chiarello referred to some other branch of medicine for some additional help?

A Yes.

Q And what branch of medicine was that?

A He was referred to psychiatry. He was also referred back to neurosurgery for a rhizotomy.

Q Doctor, besides the complaints in his back and his neck when you saw him, were you treating him for any other

condition?

A No, just his neck and back.

Q Had he made complaints to you of impotency?

A Yes. That was all part of the neck and back history and examination. When the area of the spinous transmissions are involved at this level and lower, which is the levels involved, from personal experience there is a sexual impotency that does occur, and this impotency is real and it's difficult to ascertain at the time whether it's purely physiological, that is, the body function, and/or the mind. Sometimes it's both. In Mr. Chiarello's case, with the amount of findings by myself and my colleagues, we felt that this was --

MR. SCHULTZ: Objection, your Honor. At this time.

A -- physiological.

MR. SCHULTZ: I object to the word "we." It's being used all the time.

THE COURT: You should testify what you know.

A It was my professional opinion that this was involved with the spinous processes involving the areas that stimulate, transmit and control the sexual functions.

Q Thank you, Doctor.

Now, you mentioned a rhizotomy. Can you tell us what that is?

A Rhizotomy is an old procedure. It's a salvage procedure where you just go in and destroy these nerve fibers, these areas that are giving you pain. It's popular in cancer patients and also in patients with irretractabl pain. There is a patient where nothing is working, nothing is helping. Surgical intervention can only make it worse because of the scars. So what you try to do is destroy completely that area of the body that is going to give you pain.

Q Was that done with Mr. Chiarello?

A That was done on Mr. Chiarello.

Q Following that procedure, was there a change in his pain?

A There was a slight change in the pain but not a marked change in his pain.

Q Did the pain that he had been experiencing before this procedure come back?

A Yes.

Q What was done at that time? Was that the myelogram you were telling us about?

A Yes. Then after examination my original statement was that he either had too much scarring, involving of the nerve, or a new disc.

Q Doctor, may I stop you for a moment? Would both

of those conditions be related to the original injury you had operated on?

A Yes.

Q Go ahead.

A So we did another myelogram. I ordered another myelogram to convince myself that there was another herniated disc for the same reason I gave you before. This new myelogram which was done at Hollywood Memorial Hospital indicated there was still a herniation present in the level of L4-L5.

Q Is Mr. Chiarello still under your care, Doctor?

A Yes.

Q Can you tell me, going back to August of 1973, with what frequency you examined and treated Mr. Chiarello?

A At least monthly, sometimes weekly.

Q What, if anything, are you doing for Mr. Chiarello now?

A Trying to rehabilitate Mr. Chiarello. Trying to get him some kind of physical function that he can at least communicate with the outside world in the way of function. There is no doubt in my mind that I will not operate or recommend surgery because of the amount of scarring and the amount of damage that was in that area. I thought of fusion of the spine. I do not believe this will work. I think Mr. Chiarello is at a point now that rehabilitation is the

only answer to helping him getting to a functional atmosphere.

Q When you say rehabilitation, Doctor, what are you referring to -- mental, physical?

A Both. You have a patient who is active, wants to be active, and cannot be because of physical impairment. There is no dividing line between his mentality, his emotional state, and physical state. What we try to do is first preserve and keep those muscles that are good to continue to be active and try to rehabilitate the patient to learn to use different muscles to compensate for the motor components that are damaged. This involves both mentally, emotionally, socially and physically.

Q Doctor, Mr. Chiarello has testified when he came to Florida you advised him to get a swimming pool as a form of exercise.

A Yes. Swimming because of the buoyancy and the ability to use the muscles with protection. Immersion is probably the best physiohydrotherapy one can have.

Q Does the fact you are immersed in water take the weight off your body?

A Yes. Besides taking the weight off your body, it's an equal distribution as in the old polio atmosphere of rehabilitation, whereas you allow equal pressure on the body and use those muscles against the equal pressure.

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Q Doctor, while you were treating Mr. Chiarello, did you prescribe any medication to him for pain?

A Yes. Mr. Chiarello was placed on medications from the simple Talwin non-narcotic medications with the anti-spasmodic and muscle relaxatives up through Percodan and the narcotics.

Q When you say Percodan, will you tell us what type --

A Percodan is a true narcotic with an aspirin base.

Q You said beyond Percodan, true narcotic?

A Percodan is a true narcotic. He has also been placed on cortisone therapy.

Q What is the cortisone therapy for?

A Steroids, especially cortisone in the steroid group, is an antiinflammation group. You have a nerve that gets inflamed greater than what it was, and these nerves unfortunately come out of bony ridges. They come out of bony canals, they come out of bony garages. When they swell up they have no place to go so they keep hitting this bone and they perform this cycle. What we try to do with steroids intermittently at a time is to cut down the swelling of this nerve. Unfortunately, in most cases they don't work on a longstanding basis because it's a chronic inflammation and it's not really a flare. Here the nerve is destined to stay at size because of the scarring and the previous problems with the

nerve.

Q Doctor, Mr. Chiarello has been under your care for I guess two and a half years now. What, if any, progress has he made?

A None.

Q What, if any, progress do you expect him to make?

A Truthfully, I don't expect any progress.

Q When you first saw him, Doctor, on August 14th of 1973, in your opinion was he able to perform any gainful occupation?

A No.

Q In your opinion now, Doctor, as of the present time, is Mr. Chiarello able to perform any gainful occupation?

A No.

Q In your opinion, Doctor, in the future, will Mr. Chiarello ever be able to perform any gainful employment?

A No.

Q Doctor, I want you to assume that on June 30, 1972, while Mr. Chiarello was driving home from work from Bayonne, New Jersey, his car was stopped behind another vehicle on the Bayonne Bridge and he was struck in the rear by a bus with enough force to break the front seat of the car and throw it downwards and he was tossed backwards on his back, that his car was propelled some ten feet into a car in front

of him, smack into the car in front of him, and when he hit the car in front of him he was tossed back up again, his head hit the visor and he was draped over the steering wheel, that following the accident Mr. Chiarello was white and shaken, he stayed in the car for awhile and eventually was picked up at the bridge by a brother-in-law and taken home, that he was treated by a Dr. L. Jackson Spitz, who after two visits referred him to his family physician who referred him to a Dr. Urs, a neurologist or orthopedist, who, in turn, sent him to a Dr. Leventhal, a Dr. Moreno, a Dr. Frank, and that finally in January of 1973 he went to the Richmond Memorial Hospital, Richmond, Virginia, where a myelogram was taken and where a diagnosis of a herniated intervertebral disc of L4-L5 was made. In your opinion to a reasonable medical certainty, is this accident a competent producing cause of the injury?

A Yes.

Q Was the injury Mr. Chiarello sustained a competent producing cause of pain? Was it a competent producing cause of disability?

A Definitely.

Q Is the disability you found Mr. Chiarello to be suffering with on the first examination and all the subsequent examinations and your future opinion due to the injuries

he sustained in this accident?

A Yes.

Q Doctor, what is the fair and reasonable value of your services to Mr. Chiarello to date?

A My services?

Q Yes.

A I apologize not having a bill, but they are the usual and customary charges.

Q We don't know what those are, Doctor. You will have to tell us.

For example, what was the value of your assisting at the operation --

THE COURT: The doctor must have billed the patient.

THE WITNESS: I apologize for not having the bills.

Q Can you give me an approximation, Doctor?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q Can you figure it out from looking at your charts, Doctor?

A Yes, I can.

(Pause)

A $2,000.

Q Doctor, were you personally present when Dr. Gervin

performed this operation?

A Yes.

Q Are you familiar with the fair and reasonable value of the services of a neurosurgeon for a hemi-laminectomy?

A Yes.

Q What is the fair and reasonable value of Dr. Gervin's services in performing this operation?

A $2,500.

Q Are you familiar with the fair and reasonable value of Dr. Gervin's services for performing a rhizotomy?

A Yes.

Q And what are --

A Between 500 and $800.

Q And the myelogram?

A $250.

MR. LASSOFF: Thank you very much, Doctor.

CROSS EXAMINATION

BY MR. SCHULTZ:

Q Dr. Leone, what time did you arrive here today?

A The plane arrived at La Guardia Airport at 11:05 exactly. It was on time.

Q Now, Doctor, you told us that you assisted at the operative procedure of the procedure that was done on December 3rd or 5th, 1973, is that correct?

A Yes.

Q Now, Doctor, did you review the hospital records --

MR. SCHULTZ: May I have those, please?

THE WITNESS: Are these the hospital records?

Q Did you review those before you took the stand?

A No.

Q You did not?

A No.

Q Did you take any X-rays of this gentleman?

A No. I have the hospital X-rays.

Q Did Dr. Gervin do the operative procedure, sir?

A Yes, sir.

Q Doctor, would you tell us, if you will, sir, was the entire disc removed?

A One never knows if the entire disc is removed, and especially in Mr. Chiarello's case we had too much scarring and too many abnormalities of the surrounding tissue to probe any deeper than we did.

Q Doctor, you didn't do any of that, did you?

A No. The actual removing of the disc, no.

Q That was done by Dr. Gervin, whatever was done was done by him?

A And myself.

Q You observed?

A No. There are only two doctors at the operating table, Dr. Gervin and myself.

Q What I am trying to say is you didn't actually do the actual work on this disc, did you?

THE COURT: Wait a second. If you mean the actual removal of the disc itself, the witness says no. That doesn't mean he doesn't help perform the operation.

MR. SCHULTZ: I understand.

Q What did you do at this operative procedure?

A First assistant at a surgical procedure exposes the area with the help of retractors, forceps and tissue removing instruments. He is also, in a laminectomy, the assistant to retract the nerve and nerve roots so the neurosurgeon has both of his hands free to handle the disc material.

Q Doctor, who created the rent in the sleeve?

A Dr. Gervin, as far as I was aware of, at the time of the surgery, because when we saw the fluid coming out we noted it.

THE COURT: Was this rent in the sleeve created during this operative procedure or did it exist before the operation?

THE WITNESS: It was created at the table.

Q Doctor, you told us that these -- incidentally, Doctor,

before you took the stand today did you talk with Mr. Lassoff?

A Approximately five minutes, maybe less.

Q Did Mr. Lassoff indicate to you in any way potential questions that I might ask you?

A Not to my knowledge, no.

Q Now, Doctor, incidentally, have you testified in court before?

A Yes, sir.

Q You have testified in court before basically for people who are making claims?

A I am a court-appointed orthopedic surgeon.

Q So do you testify in behalf of people that are making claims?

A When I am called upon, yes.

Q Doctor, with relation to this removal of the disc, you don't know at this time whether all of it was removed or not, do you?

A No.

Q Doctor, further, was there a removal of any of the lamina?

A Yes.

Q And that was on one side only, wasn't it?

A Yes.

Q Now, Doctor, with relation to the scarring and the

adhesions, as I recall your testimony you stated that when you went into the area in question -- I assume you did the opening up, did you?

A Both.

Q Did you do the tying off of the various bleeders?

A We used coagulation method. We tied up only major bleeders.

Q Sir, when you went in, you told us that you saw scarring of long standing. Those are the words you used.

A Yes.

Q Doctor, this scarring of long standing, where was it?

A In the fascial planes, nerve root coverings and the areas of the soft tissue of the intervertebral space.

Q When you say the areas of soft tissue of the intervertebral space, what are you talking about?

A Ligamentous fibrous tissue which attaches the spinous processes, the processes of the lateral extensions and the soft tissue surrounding nerves, vessels and other tissues of the structure.

Q Doctor, isn't it true that the scarring was epidural scarring? I want you to look at this operative report.

A It is all epidural.

Q Would you look at it, sir, (handing)?

A Yes.

Q And, Doctor, you told us this was of long standing, isn't that true?

A Yes.

Q Doctor, this long-standing scarring -- withdrawn.

Did you, in reviewing the history of Mr. Chiarello, did you determine whether or not he had ever played football?

A The scarring that I was --

Q I asked you about football.

THE COURT: The question is do you know that he played football.

A Professionally?

THE COURT: No. Did he play football, high school, college.

Q Did you make any inquiry as to that?

A If he played football? No.

Q Did you know, sir, did you make any inquiry of him as to whether or not he had received blows while playing football in and about his neck and his back? Did you ever ask him that?

A No.

Q Did you ever ask him, sir, whether or not in the course of his employment for a period of three or four or maybe longer years that he had been lifting heavy weights?

A Weight lifting heavy weights or during work?

Q During the course of his employment, from 50 to a hundred pounds.

A No.

Q Did you ever ask him, sir, whether or not he had had to slide freight doors on freight cars?

A No.

Q Doctor, with reasonable medical certainty, sir, can the lifting of weights, heavy weights, lifting them up, from 50 to a hundred pounds, can this be the competent producing cause of back injury?

A It can be.

Q Can the receiving of blows in and about the neck, shoulders and back, can that be the competent producing cause of injury?

A It can be.

Q And, sir --

MR. SCHULTZ: May I have a moment, sir, to locate something?

(Pause)

Q I want you to assume, sir, if you will, Mr. Chiarello testified some prior time.

"Q And you played football which was the equivalent of high school football, did you not?

"A It was high school football.

"Q What position did you play?

"A Tackle.

"Q I assume that in that game you had to absorb some blows in and about your neck and back, isn't that true?

"A Yes, sir, that is true."

Just to continue, sir, I want you to assume these questions and answers were made by Mr. Chiarello:

"Q Prior to this occurrence, sir, you told us that you worked as a pier superintendent on the docks, is that true?

"A Yes, sir, that is true.

"Q And as part of those duties did you have to lift before this accident heavy objects?

"A When it became necessary, yes, sir.

"Q And, sir, did you have to slide doors of freight cars?

"A When it became necessary, yes, sir.

"Q What are some of the weights that you had to lift during this period of time, say seven or eight years before this occurrence?

"A Some pretty heavy weights. I guess a carton of 50 to 60 pounds.

"Q How heavy is the door to roll open?

"A Come to specifics, that would be very hard. That would mean I would have to stop before I pick something up and read the approximate kilos and pounds.

"Q Can you tell us some of the estimates of the weights you did lift prior to this occurrence?

"A Maybe one pound to a hundred pounds, anywheres in there."

Now, sir, I want you to assume those were the questions and answers that were put to Mr. Chiarello and that he made on a prior occasion.

Can you tell us, sir, with reasonable medical certainty whether or not the lifting of weights, absorbing of blows by playing tackle, football, at a high school level, whether that could be a competent producing cause of back injury.

A Of Mr. Chiarello?

Q On anybody.

A It can be a producing cause if it causes it.

Q Now, sir, can you tell us -- when you tell us of this long-standing scarring, sir, with reasonable medical certainty can you tell us when that scarring actually commenced and took place in point of time?

A Approximately twelve days after an injury to this

area.

Q Sir, is it possible for a person to have an injury to the L4-L5 interspace, sir, and have scarring and that it does not really manifest itself until sometime thereafter?

A No.

Q Is it possible, sir, that the scarring that you observed pre-existed the occurrence in 1972?

A No, sir.

Q Now, sir, did you have anything to do with the rhizotomy?

A No, sir.

Q You told us, sir, that the rhizotomy -- I believe you told us that it had no effect or minimal effect?

A Your question, if I may, was if I had anything to do with the rhizotomy?

Q Yes. And you said no.

A No.

THE COURT: You weren't at the operation?

THE WITNESS: No, I wasn't.

Q Do you know when the rhizotomy took place?

A Approximately October, '74.

Q Did you tell us on direct examination that the rhizotomy had no effect?

A Yes, sir.

MR. SCHULTZ: Do you have the Memorial Hospital record?

MR. LASSOFF: Certainly.

MR. SCHULTZ: For the rhizotomy.

MR. LASSOFF: Give me a second.

(Pause)

Q Could you tell us, sir, who Dr. Giulanti is?

A Dr. Giulanti is Dr. Gervin's partner, also a neurosurgeon.

Q Do you know who did the rhizotomy?

A No, sir, except it was either Dr. Gervin or Giulanti or both.

Q Doctor, I am going to read to you from Plaintiff's Exhibit 6:

"Memorial Hospital. Narrative summary. Chiarello, Thomas, Jr., 266462, admitted 10/3/74. This patient is a 37 year old white male who has had chronic intractable right leg and back pain. The patient previously had lumbar laminectomy and discectomy without relief of pain. He entered at this time for a facet rhizotomy by radio frequency control. This was done on 10/4/74 bilaterally at L4 and L5 and L5 and S1. The patient was immediately pain free and discharged at this time for follow-up in the office."

Did you ever see that record, sir?

A No.

Q Did you think it might be important to look at the hospital record for the rhizotomy before you testified here for Mr. Lassoff today?

A No, sir. All rhizotomies give you complete recovery.

MR. SCHULTZ: I move to strike it, your Honor. It is not responsive.

THE COURT: Sustained.

Q Dr. Leone, have you ever witnessed a rhizotomy?

A Yes, sir.

Q Doctor, is that a method whereby electrical impulses are placed into the patient's spine so as to sever certain nerves?

A Yes, sir.

Q Now, Doctor, with relation to a transcutaneous nerve stimulator, is that a box that holds batteries, I assume?

A That's one form.

Q Do you know the one that was applied to Mr. Chiarello?

A Yes.

Q Did it have batteries?

A Yes.

Q And it attaches to the belt, does it not?

A To the what?

Q A belt, you carry it on a belt, the box?

A Yes, sir.

Q And it has two wires which really are in the form of electrodes, aren't they?

A Yes.

Q And these are applied to the area of the back or whatever area it is in question, is that correct?

A Yes, sir.

Q Doctor, in the use of this transcutaneous nerve stimulator, isn't it the function of that to supply electrical impulses to the area in question?

A Yes, sir.

Q Doctor, does this create an arcing and burning on the back, a physical burning?

A Yes, it can.

Q Did it in Mr. Chiarello's case?

A He had some --

Q Did it, sir.

THE COURT: He is in the middle of an answer. Don't cut him off.

A He had irritation of the skin, yes, sir.

Q Did it have burning from arcing, sir?

A I don't know what burning from arcing means, sir.

Q Did you see any burning?

A I saw a first degree burn.

Q And how long did this man use this stimulator?

A I don't know for sure. It was under the care of Dr. Gervin.

Q It wasn't under your care?

A No, sir.

Q And then it was removed and terminated?

A When it didn't work.

Q Now, Doctor, you told us -- have you ever heard of a Dr. Kaplan, Larry Kaplan?

A I know many Kaplans.

Q Do you know Lawrence Kaplan?

A No, I don't, sir.

Q Now, Doctor, what nerves do you say control the area in and about the sacral area that would cause or have anything to do with impotence?

A The areas of the cauda equina, the tail.

Q That is normally referred to as the horse's tail?

A The lowest part of the spine.

Q Doctor, did you conduct any neurological tests involving the so-called horse's tail?

A Clinical neurological examination, yes.

Q Did you conduct any neurological tests?

A Yes.

Q Which ones?

A Clinical neurological tests.

Q Which ones?

A Sensory.

Q What did you do? Tell us exactly what you did.

A The examination of sensory nerves consists of examination for pain, stimuli, pinpoint --

Q Doctor, I am asking which ones you did pertaining to the sacral area that would control impotence.

A Two-point discrimination by pain, two-point discrimination by light touch, two-point discrimination by pressure.

Q Which nerves, Doctor?

A There are no specific nerves in the sacral area other than the L5-S1 sciatic nerves.

Q Isn't that a branch of the sciatic nerve?

A Is what a branch?

Q The area that controls the sacrum?

A Yes, sir.

Q Is that correct, sir?

A That's part of the --

Q Does that emanate, Doctor, from the space between L5 and S1?

A No,sir.

Q Sir?

A No, sir.

Q The sacral nerve does not come out between L5 and S1?

A It comes out from the lower portion of the S1.

Q That's not at the area where this operative site was, was it?

A No.

Q May I see your charts, please, and records?

(Witness hands to Mr. Schultz)

MR. SCHULTZ: May I have a minute to look at this, your Honor? It will take some time.

(Pause)

Q Doctor, would you be good enough to show me in your records when you made these neurological tests?

A From the first day of my examination and the last day.

Q Could you show me the results of that?

A Yes, sir. On August 13, 1973, dictation of -- dictated reports of lumbosacral disc, radiculopathy, right sided, with G.U.G. involvement as reported.

Q Could you tell me where it shows what tests you performed there or did you not make a record?

A I didn't make a record. I had a record.

Q Where is that record?

A From the previous reports of Dr. Friedman and Dr.

Lanier and indicated here that I agreed with their findings.

Q In other words, you used the records of Dr. Friedman and Dr. somebody else, is that right?

A I didn't use their records.

Q You used their reports?

A I didn't use their reports. I agreed with their reports.

Q Where do you have in your records the exact tests you performed, if they are there?

A I didn't have to put them there.

Q You don't have them there?

A No.

Q Doctor, how many patients do you see in the course of a day?

A On Monday I see approximately fifteen patients; on Tuesday approximately fifteen; on Wednesday approximately fifteen; Thursday I see no patients; and Friday approximately fifteen. Approximately fifteen patients four times a week.

Q Doctor, is there any place in this chart or records that you have here where you have set forth or set down the exact tests that you performed on this man?

A No. They are routine tests.

Q Doctor, did you send this gentleman to a Dr. Hochberg?

A Yes, sir.

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Q Doctor, would you be good enough to tell me in your examination of this man did you find any cranial nerve findings at all?

A No, sir.

Q Did you do a right ankle jerk test on this man?

A A right ankle jerk.

Q Did you do the ankle jerk tests on this man?

A Yes.

Q Do you have any record of it in your records?

A No, sir.

Q Do you know whether they were equal or what?

A The patient had right-sided diminished neurological findings.

Q Did he have any loss on the left?

A Not to my knowledge.

Q Was there ever a time that they were the same?

A Yes, sir.

Q When was that?

A I have no idea. It's physiological.

Q You don't know when they were the same, if at all?

A No.

Q Do you have any records there?

A No record.

Q Did you measure the size of this man's corresponding lower appendages?

A Length or width?

Q The width.

A Yes, sir.

Q Where do you have that?

A I don't have it. It wasn't a positive finding.

Q In other words, you found the measurements to be the same?

A Yes, sir.

Q There was no atrophy or shrinking of either calf, is that right?

A We --

Q Sir, just answer that.

A No, sir.

Q They were both the same?

A They were both the same.

Q Did you find any diminishment in the peroneal distribution?

A Yes, on the right side.

Q When did you first become aware that there was some litigation involved here, sir?

A I really don't know. I really don't know. I assumed from the first day that there was litigation.

Q Sir, do you know a Dr. Duke Baird?

A No, sir.

Q Did you receive a report from Dr. Baird?

A Yes, sir.

Q You don't know who he is?

A I know of him. I have never met him.

Q Do you know what kindof a doctor he is, sir, what his spcialty is?

A No, I don't. I am looking for his correspondence. Dr. Baird, no, I don't. Orthopedic surgeon.

Q Now, Doctor, you were asked as to whether or not Mr. Chiarello could ever pursue gainful employment. Doctor, is it possible this gentleman can do sedentary work?

A Depending on the length of time for sitting and position.

Q He is capable of performing some limited work, is he not?

A Some limited work, yes.

Q In other words, this gentleman is not a man who cannot do any work at all, he is capable of doing sedentary work, isn't he?

A Depending on his tolerance.

Q At this point, sir, he could do non-manual labor, isn't that true?

A Depending on his tolerance for sitting, position.

Q The point is could he sit and work for two or three hours at a time and then get up and go back to working again?

A I think two or three hours is too long.

Q Two hours?

A An hour, an hour and a half.

Q And then he could get up and go back again?

A It depends on his tolerance, how much pain, how much disability he has after sitting for an hour and a half.

Q Have you made any observation as to that?

A Yes. Mr. Chiarello explains to me when he sits he does have problems after sitting for a period of time and after getting up and trying to get active after sitting.

Q Doctor, when you say he could not do any gainful employment, I assume you mean physical, manual labor?

A Mr. Chiarello physically cannot do any employment which concerns lifting, pulling, sitting or riding in any motor vehicle. Mentally and emotionally I suspect strongly --

MR. SCHULTZ: Move to strike it.

THE COURT: Sustained.

Q You are not a psychiatrist, are you?

A I am a M.D.

Q You are not a psychiatrist?

A No.

Q You don't deal on a day-to-day basis with the mind, do you?

A Yes, I do, sir.

Q Doctor, in this particular case, how long do you estimate that Mr. Chiarello could work continuously at a sitting-down job at any given time?

A According to his tolerance for the sitting position.

Q What is it, sir, do you know?

A I don't know.

Q Doctor, did you give Mr. Chiarello a physical examination?

A What do you mean by "physical"?

Q Did you check his blood pressure, his weight?

A No, sir.

Q Did you know, sir, that this gentleman had elevated blood pressure?

A I noticed when he was in the hospital he had some elevation of blood pressure.

Q Did you know he had been under treatment for that for a period of at least three or four years before this occurrence?

A I knew he was seen by medical doctors but I didn't know if he was under treatment for it for three years.

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Q Did you look at the hospital record?

A No, not recently.

Q Would you do that, sir?

A The whole record?

Q No, at the report of the consultant.

A The medical consultant?

Q Yes.

A Dr. Treiber?

Q Yes.

A Yes, sir.

Q Had you ever looked at that before?

A Yes, sir.

Q Now does that refresh your recollection that this gentleman had a high blood pressure condition?

A No.

MR. LASSOFF: Objection. The doctor already said he was aware of it. How could it refresh his recollection when he was aware of it at all times?

THE COURT: He may by reading something recall.

Q Did you know, sir, that this gentleman had hypertension?

A Did I know before this record?

Q Yes.

A No.

Q You didn't know that?

A No.

Q Did you know, sir, that he had had a hiatal hernia?

A No, sir.

Q Did you know, sir, that this gentleman had a history of smoking three to four packs of cigarettes a day?

A I know he smoked. I have no idea how many packs.

Q Would you look in there and see whether that is part of the hospital record?

MR. LASSOFF: Objection, your Honor. The hospital record speaks for itself.

THE COURT: He is entitled to ask the question.

A Yes, sir.

Q Had you ever known that before?

A When I read this consultation at the time it was written.

Q Sir, the blood pressure that's there, it has two rates, does it not?

A Yes, sir.

Q Sir, one is the systolic rate, is it not?

A Yes, sir.

Q Which is the systolic rate on that report?

A 140.

Q 140?

A Yes, sir.

Q And what is the other one, sir?

A Diastolic.

Q What is that?

A 104.

Q Sir, for a man of Mr. Chiarello's age and weight, do you have an opinion as to the diastolic rate? Is it high?

A It's high at that reading.

Q Sir, coupled with the fact that he smoked three or four packs of cigarettes a day at that time and his weight was what -- 260 pounds?

A Approximately.

Q -- do you have an opinion, sir, would that have an effect on his life expectancy?

A According to statistics and based on his genesis, family history, yes, sir.

Q Do you have an opinion as to whether or not his life expectancy would be reduced as a result of that condition?

A If that condition is a permanent condition, yes.

Q It would reduce his life expectancy?

A It could.

Q Is that correct, sir?

A It could.

Q Sir, with relation to overweight and obesity, does that have an effect on a person's back?

A Yes.

Q And it has an adverse effect on a person's back, does it not?

A Depending on whether the back is strong enough and geared enough to support it, yes.

Q And it will have an adverse effect, will it not, over a period of time?

THE COURT: You mean in the future?

MR. SCHULTZ: In the past, too, your Honor.

THE COURT: Then break it down.

Q Do you have an opinion, sir, as to whether or not this man's obesity had any effect on this man on his back?

A Mr. Chiarello's?

Q Yes.

A Not if he played active football in high school and was able to work actively by lifting, no.

Q Sir, I take it it is your opinion his obesity --

THE COURT: You keep using the word "obesity." I am not sure Mr. Chiarello was obese prior to the happening of the accident. I have no testimony here as to what it was before.

MR. SCHULTZ: He has already testified he was 260 pounds.

THE COURT: Now he is 260. 260 pounds when he played football? I don't know that.

MR. SCHULTZ: Thank you, Judge.

Q Doctor, considering this man's height and weight, assuming, sir, that he weighed about 260 pounds, which was his testimony here this morning, both before and after this accident, would you consider him to be obese, sir?

A The question indicates -- read the question.

(Question read)

A Overweight.

MR. LASSOFF: May I have the man's height added to the question, your Honor? I believe he testified he is 6-2½.

THE COURT: Yes.

Q What would be your answer?

A I would say overweight, not obese.

Q Does that overweight condition, sir, have any effect, adverse effect, on his back?

A Yes, it does, at this time.

Q Sir, with relation to his weight, you apparently had some question. I want you to assume, sir, Mr. Chiarello testified on a prior occasion -- do you want to check my reading?

MR. LASSOFF: I believe you can read it.

MR. SCHULTZ: If the Court please.

Q "Q Would you tell me, sir, would you tell me how much you weighed at the time of the occurrence?

"A The same thing, 260.

"Q What do you weigh now?

"A 260."

MR. LASSOFF: If your Honor please, I didn't object to his saying in the question 260 before and after. I don't know why he is reading.

THE COURT: I don't either.

MR. SCHULTZ: Your Honor said there was no testimony about it.

THE COURT: Then you phrased a question assuming it as that weight and the witness answered it and there was no objection by counsel.

MR. SCHULTZ: I thought there was a question that he hadn't weighed that.

THE COURT: After I made the comment, you included it as though he had testified to it this morning and counsel didn't make any objection. So it doesn't bother me.

Q Now, Doctor, bearing in mind that fact that he has that weight and that height, does that have an effect on his back at this time?

A I believe I answered that question.

THE COURT: He answered that already.

Q Doctor, did you know that this gentleman at one time had been on Weight Watchers?

A No.

Q Did you recommend to him that he lose some weight?

A Yes, I did.

Q Has he done so?

A I don't believe so.

MR. SCHULTZ: Excuse me, your Honor. I am looking for a report and I can't seem to find it.

Q Doctor, did you say that you had observed some cervical involvement?

A Yes, sir.

Q Did you know that there had been a cervical myelogram?

A Yes, sir.

Q What was the result of that cervical myelogram, sir?

A Negative.

Q Did you know that there had been X-rays taken of his cervical vertebrae?

A Yes, sir.

Q Incidentally, did you know, sir, that the record shows that there was no -- that there was normal alignment of the cervical vertebral bodies, did you know that, sir?

A Yes, sir.

Q Did you know, sir, that there was no evidence of compression fracture or displacement?

A Yes, sir.

THE COURT: Of the cervical?

MR. SCHULTZ: Yes.

Q And, sir, did you know that the cervical interspaces were well preserved?

A Yes, sir.

Q Doctor, if there is nerve involvement in the cervical area from Atlas C1 to C7 or C8 --

A C8 at times, if it's present.

Q Doctor, if there is nerve involvement, is there usually some root foramen encroachment?

A No.

Q Was there any root foramen encroachment here?

THE COURT: In the cervical area?

MR. SCHULTZ: Yes.

Q Was there, do you know?

A No.

Q There was none, was there?

A None that could be demonstrated.

MR. SCHULTZ: If your Honor will excuse me a minute, I am looking for a report and I can't seem to find it.

MR. LASSOFF: Tell me what it is and I will help you.

MR. SCHULTZ: Dr. Sporn's report.

MR. LASSOFF: That is in a different hospital. Is this what you want?

MR. SCHULTZ: Which hospital?

MR. LASSOFF: Richmond Memorial, Plaintiff's Exhibit 2 in evidence.

Q Doctor, have you ever heard of Dr. Sporn?

A Not to my knowledge.

Q Did you look at the record in the Richmond Memorial Hospital?

A No, sir.

Q Did you ever look at it?

A No, sir.

Q I am going to read to you, sir.

"The physical examination" -- this is from Plaintiff's Exhibit number 2, if the Court please.

"The physical examination reveals an obese man who does not appear acutely ill. The blood pressure is 145 over 90 in the left arm sitting."

Doctor, the 145 is what? Is that the systolic?

A If that's the top number, yes.

Q Sir, that's in the sitting position without exercise.

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Is that high, Doctor?

A It should be higher in the sitting position. It's not the proper way to take blood pressure.

Q But is it high?

A 145, no.

Q And what about the diastolic rate of 90?

A As a general rule, a diastolic rate under 100 is within normal limits. I would not be concerned with a blood pressure like that.

Q Doctor, do you know that this Dr. Sporn reached the impression that this man had marked exogenous obesity?

Do you agree with that?

A I don't know what kind of doctor Dr. Sporn --

Q Do you agree with it?

A Would I agree with the term "exogenous obesity" for Mr. Chiarello now?

Q At the time he was in this hospital.

A I didn't know him.

THE COURT: He didn't know him at the time he was in the hospital.

Q Assuming he weighed 260 pounds.

MR. LASSOFF: Would you tell us what the hospital record says he weighed instead of assuming anything, Mr. Schultz.

MR. SCHULTZ: I don't know if it's here. It doesn't seem to indicate it here.

MR. LASSOFF: May I look at that?

MR. SCHULTZ: Sure.

(Pause)

MR. SCHULTZ: I objected to this and you said it could be redacted.

MR. LASSOFF: This hospital record is in evidence and it is listed in the pretrial order.

THE COURT: I said portions of the hospital record that weren't proper portions of the record would be taken out.

MR. LASSOFF: There are no improper portions. This is the hospital record as it existed before.

THE COURT: All I can tell you is objection was made that it contained certain portions and I said they wouldn't be in. Between you and Mr. Schultz you ought to agree on it.

Q Doctor, all I want to know from you at this point is, do you agree with the diagnosis of Dr. Sporn that this man has marked exogenous obesity?

THE COURT: As of today. He can't testify as of the date.

MR. SCHULTZ: I agree with that, your Honor.

THE COURT: Then I am asking what are you talking about, then or now?

MR. SCHULTZ: May I read this first to see if the doctor knows?

Q Doctor, did you ever know that on January 30, 1973, a diagnosis had been made of this man, "Marked exogenous obesity, heavy cigarette smoking, three packs a day, hypertension, probably related to overweight"?

Did you know that, sir?

A No, I didn't.

Q Was that important to your diagnosis of some of his problems?

A No, sir.

Q Doctor, would you say that 160 over 90 is high blood pressure?

A No. When the diastolic is -- I am not an expert in hypertensive disease, but any diastolic under a hundred I think is within a safe range and I would not call that hypertensive disease.

Q And the systolic doesn't mean anything?

A The systolic means something. However, it is not -- diastolic pressure is the pressure, which supposedly, at rest, where the kidneys are over-abundant with their pressure. Any excessive systolic pressure is important, of course, as

a means to identify the severity of hypertensive disease, but a diastolic pressure under 100 is certainly not, and especially at random taken in a sitting position, is not even diagnostic in any form or manner of making a diagnosis of hypertensive disease.

Q In any event, sir, you didn't review this record to make a determination as to what your findings were?

A I thought I testified I never saw that record.

Q Now, Doctor, did you recommend that Mr. Chiarello actually swim in this pool?

A No, no. Hydrotherapy, immersion, as I explained before, is fantastic therapy, because it allows full pressure equally on the body without performing any excessive muscular activity.

Q In other words, Doctor, you didn't recommend that he exercise by swimming?

A Exercise by swimming in the sense of underwater swimming, crawl stroke or any swimming activities? No, sir. Just hydrotherapy.

Q Just lying there.

A Submersion.

Q You didn't recommend that he exercise at all by swimming?

A Oh, yes. Leg exercises, the same as the theraputic

means for any activity in a swimming pool other than swimming.

Q Did you recommend that he use and put his hands on the side of the pool and kick his feet?

A I recommended anything and everything he can do in the water will be helpful to his condition.

Q Sir, specifically, did you recommend that if he could swim that he should swim?

A I definitely told him not to swim in any deep water or in an ocean because he couldn't.

Q How about in a pool?

A Not in the deep end of the pool.

Q To swim in the regular pool?

A No. My prescription to him was he can do anything and everything that his body would allow him to do in the pool except do not attempt deep water swimming because of his condition.

Q If he could swim in the shallow end, that would be all right?

A Anything that he can possibly do in the water to allow him to actively use his physical force, yes.

Q Doctor, when this man -- may I see your records again, please?

Just your visits, not all the reports there.

Do you have any other record of visits other than

these, Doctor?

A Yes (handing).

Q Would it be fair to say, Doctor, that you saw this gentleman approximately once a month?

A No. It would be fair to say I saw him approximately on an average, since I originally examined him with the hospital visits and all, approximately once a week.

Q Doctor, do you have records of these weekly visits?

A Mr. Chiarello --

Q Sir, do you have records of the weekly visits here?

A I have records of the visits that are there at the time when I saw Mr. Chiarello but it does not reflect all the visits.

Q In other words, what you are saying is that -- Doctor, is it fair to say --

MR. SCHULTZ: May I stand here, if your Honor please.

Q Is it fair to say that your records indicate here that you saw him on September 21, '73; October 5, '73; November 5, '73; November 15; January 7, '74; February 20, '74, June 7, '74; September 12, '74; October, '74; October 30, '74; November 13, '74; January 22, '75; February 26, '75; April 30, '75; September 15, '75; and January 20, 1976, is that correct? Is that what these records indicate?

A Yes, sir.

Q Are these the records that you kept in the regular course of your business?

A Yes, sir.

Q And you say there are other records?

A No, sir. If I may, Mr. Chiarello is one of the very few patients who has my private telephone number. I have seen, I have examined, I have conversed in person, on the phone on numerous occasions, on weekends, after office hours.

Q That are not reflected here?

A They were not in the office.

Q And you kept no records?

A I kept no record.

Q Incidentally, Mr. Leone --

A Doctor. I am sorry. -- you say you were at Downstate Medical Center, right?

A Yes, sir.

Q That's Kings County, isn't it?

A No, sir. Kings County is a county hospital. Downstate is State University.

Q Do they work interchangeably?

A What do you mean "interchangeably"?

Q As a resident at, say, Downstate, did you work at

Kings County, too?

A Yes, sir.

Q Doctor, did you know the Chiarello family before you left New York City?

A No, sir.

Q Did you know American Stevedores?

A No, sir.

Q Did you know that the Chiarello family owned American Stevedores?

A No, sir, I didn't know until you just told me. I never heard of American Stevedores.

Q You didn't know about G.B. Chiarello, Joe, James?

A I don't know any of the Chiarellos other than the patient, and since then his father.

Q Father or father-in-law?

A I know his father-in-law, too, but it is not Chiarello.

Q Did you know his father-in-law?

A I met his father-in-law.

Q Had you known him before you came here?

A No, sir, I didn't know him.

Q Do you know Dr. Spitz?

A No. I met him today for the first time.

Q Did you come here pursuant to a subpoena, sir?

A No.

MR. SCHULTZ: I have nothing further.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. LASSOFF:

Q Doctor, would it be fair to state that all patients entering a hospital have elevated blood pressure?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Yes, that's a fair assumption, because of the anxiety and the apprehension of a patient entering a hospital.

Q Doctor, when you were asked about the rhizotomy and prior to that I think Mr. Schultz had said something about all complaints of pain were gone and you started to say with all rhizotomies, will you tell us what you were going to say then?

A Yes. The rhizotomy itself on initial impression immediately after any rhizotomy that I have seen or heard of or known or have been involved in, there is immediate relief or remission of pain until scar tissue forms again or a new or neuromas develop or the nerves that were sublinimally deflected away from their synapse, their transmission of pain, this is real initially after rhizotomy.

Q You used the word "neuroma," Doctor, is that regenera-

tion of a nerve but a wild regeneration?

MR. SCHULTZ: Objection.

THE COURT: Ask him what it is.

Q What is it?

A Abnormal tissue regeneration.

Q Doctor, I show you the hospital record at which this rhizotomy was performed and I ask you to read the final discharge diagnosis and explain what it says to the jury.

A "Intractable back and leg pain."

Q What does that mean?

A It means pain that does not let up.

Q And that was after the rhizotomy, is it not?

A Yes, sir.

Q Doctor --

THE COURT: Wait. Before you leave that, how can you have both?

THE WITNESS: Pardon me?

THE COURT: How can you have a hospital report that says he is pain-free and on the other hand says he has intractable pain?

THE WITNESS: The report that states he was pain-free right after his rhizotomy is here at the same admission, same hospital record, and that is expected right after --

THE COURT: What is the date of that entry in the

hospital record?

THE WITNESS: "Intractable back and leg pain" was done on the date of discharge.

THE COURT: Date?

THE WITNESS: I am looking, sir. 10/5/74.

THE COURT: How about the comment he was pain-free?

MR. LASSOFF: I think it is the operative report, Doctor.

THE WITNESS: I am looking at it. There is no date on this. 10/3/74, sir.

Q Doctor, does this report state that the patient was pain-free or that following procedure the pain was gone except for an ache in the patient's back? The bottom of the page, Doctor.

A It doesn't say either. It says following the procedure the pain was gone except for an ache in the patient's back.

Q Thank you, Doctor.

THE COURT: Wait. Let me get this clarified. You say following the procedure --

THE WITNESS: May I read the paragraph?

THE COURT: We are trying to find out whether the answer is in reading the document or not. When they say following the procedure the patient was pain-free, are they

talking the minute the procedure is over, are they talking about an hour later, are they talking about a week later?

THE WITNESS: If I may explain. I was not there, but this is my experience with rhizotomies.

MR. SCHULTZ: May I respectfully object, your Honor?

THE COURT: No. I want to know what it means. You certainly can't leave it in its present state.

MR. SCHULTZ: If your Honor please --

THE COURT: On the face of it it is conflicting. I am perfectly willing to ask this doctor if he can explain it. If he can't, all right. On its face the hospital report is conflicting.

MR. SCHULTZ: If your Honor please, he wasn't there.

THE COURT: That's right.

MR. SCHULTZ: How does he know?

THE COURT: Because he is a doctor who is an orthopedic surgeon and ought to have some experience with these matters.

THE WITNESS: When you do a rhizotomy, sir, you have to destroy a nerve area. You wait for the patient to give you an indication whether or not the pain-free symptoms are there or did not help or, more important, if any further damage was done by inflicting this transmission by a normal

nerve or a nerve that didn't bother him.

Now, there is very little conflicting in this, if I can read the report.

THE COURT: Go ahead.

THE WITNESS: It says here -- this is Dr. Gervin saying, "We usually wait for the patient to state the pain was gone, indicating obvious nerve destruction."

He is not stating this was the case for Mr. Chiarello. He is just stating for purposes of report that they usually wait a reasonable time in the operating room following the procedure.

"Following the procedure the pain was gone except for an ache in the patient's back."

There is nothing about pain-free.

Q Would that be in accordance with your experience with rhizotomies, Doctor?

A Yes, sir.

Q Doctor, going back to your first examination of Mr. Chiarello, at the time you see a new patient do you obtain a history as to the condition of his health and any prior accident he may have sustained?

A Yes, as an orthopedist I ask for the general condition of his health and previous accidents or orthopedic problems.

Q Did Mr. Chiarello tell you that he had been ill or injured at any time in his life prior to this accident?

A No, sir.

Q Did he tell you that he had been ill or injured at any time in his life after this accident except for the accident?

A No.

Q And it was part of your job to obtain that history?

A Yes, sir.

Q And did you obtain that history?

A Yes. It's routine.

Q With regard to the scar tissue, that marked adhesions and scar tissue you found on going into Mr. Chiarello's spine and which you said was of long duration, when you say of long duration do you mean that it anteceded this accident or was after the accident?

A In this case?

Q In this case.

A In this case I would say I was talking approximately the time of the accident.

Q And was it competently produced with reasonable medical certainty by this accident?

A Yes, sir.

MR. LASSOFF: No further questions.

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RECROSS EXAMINATION

BY MR. SCHULTZ:

Q So that there is no mistake, Doctor, I am reading here from the Memorial Hospital record. Do you agree with me that it states here, "The patient was immediately pain-free and is discharged at this time for follow-up in the office"?

A That's what it says.

Q Doctor, does that indicate to you that he was discharged pain-free to be followed up?

A No, sir, because --

Q It doesn't mean what it says, in other words?

A It may very well, but there is a final statement.

Q That is what it says there; do you agree with me I read it correctly?

A That's what it says.

Q And, Doctor, does this record indicate that when this man left the hospital on 10/5/74 that he was marked as his condition having been improved?

A Yes, sir.

MR. SCHULTZ: No further questions.

MR. LASSOFF: Doctor, just a question.

REDIRECT EXAMINATION

BY MR. LASSOFF:

Q Doctor, wasn't it your testimony initially right after his rhizotomy he was improved for a short period of time?

MR. SCHULTZ: Objection.

THE COURT: That is what he testified to on direct.

A Yes, sir.

Q So there is nothing inconsistent in what you have said in any way, is there?

A No, sir.

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

Q Is there anything inconsistent in the hospital record with what you have said?

A No, sir.

MR. LASSOFF: No further questions.

THE COURT: I have one question to ask you.

On the question of weight, Mr. Chiarello is a big man not only in height but his general frame seems to be big.

If Mr. Chiarello were to lose 20 or 30 pounds, (a), would that bring him down to what would be a normal weight for a man of his size and structure?

THE WITNESS: It would bring him down closer to what we would like normal.

THE COURT: What would you consider normal to be?

THE WITNESS: In Mr. Chiarello's case with his body frame and structure and supporting tissues the way they are, I should say his weight should be around 230 pounds.

THE COURT: If he got down to 230 pounds, would your prognosis be any different than what you told us it would be?

THE WITNESS: No, at this stage, no, sir.

THE COURT: Okay. You may step down.

(Witness excused)

THE COURT: We will adjourn until tomorrow morning at ten o'clock.

We have a new courtroom.

Room 1506 tomorrow morning at ten o'clock. Thank you.

GW1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -x

THOMAS J. CHIARELLO and ANGELA CHIARELLO,

Plaintiffs,

-against-

DOMENICO BUS SERVICE, INC., and HENRY GIRDWOOD,

Defendants.

73 Civ. 2962
75 Civ. 1956

- -x

New York, New York
March 5, 1976
10:00 A. M.

B e f o r e:

HON. CHARLES M. METZNER, D. J.,

and a Jury.

A p p e a r a n c e s:

MARTIN LASSOFF, ESQ.,
Attorney for plaintiffs.

MC CARTHY, SCHULTZ & MULHOLLAND, ESQS.,
Attorneys for defendants,
JOHN SCHULTZ, ESQ., of Counsel.

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(Jury present.)

MR. LASSOFF: May I call the Port Authority police officer to the stand?

Take the stand.

J O H N A L L E N H U T C H I N G S, called as a witness by the plaintiffs, being first duly sworn, testified as follows:

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. LASSOFF:

Q On June 30, 1972, Mr. Hutchings, were you a police officer?

A Yes, sir.

Q And by whom were you employed on that date?

A Port of New York Authority.

Q And were you employed in some particular area of the Port Authority?

A I was assigned to Bayonne Bridge.

Q On that date, did you make an investigation of an accident that occurred on the Bayonne Bridge where three cars were involved, one of which was the plaintiff in this case, Thomas Chiarello?

THE COURT: Sustained.

Q Did you go to the scene of an accident on the

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Bayonne Bridge?

A Yes, sir.

Q I show you this subpoenaed record of the Port of New York Authority and I ask you if that is the report you made with regard to that accident?

A Yes, it is.

Q Now, can you tell us, according to your report, what time that accident occurred?

MR. SCHULTZ: Objection.

THE COURT: Sustained. Ask him.

Q When did the accident occur?

A 6:30 P.M.

Q And can you tell us the number of vehicles involved?

A Three.

Q Can you tell us the names of the drivers of the vehicles?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A I can read them off the accident report. That's my recollection.

MR. LASSOFF: Your Honor, I will offer the accident report in evidence as an official record of an agency subpoenaed here by due process of law under the work

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book rule.

MR. SCHULTZ: May I ask some questions on the offer, your Honor?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. SCHULTZ:

Q Sir, are you presently a police officer?

A No, sir.

Q What do you do now?

A I am a security guard at Howlong Marine Terminal.

Q Is that a place where stevedores work?

A Yes, sir, it's a pier.

Q Do you have anything to do with Universal Stevedoring there?

A No. I never heard the name.

Q Or American Stevedores?

A No, sir.

Q Now, Officer, did you actually see the accident occur?

A No, sir.

Q Did the accident happen on the bridge or on an access road?

A An access road onto the bridge.

Q When did you get to the scene of the occurrence?

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MR. LASSOFF: If your Honor please, I thought this is voir dire.

THE COURT: On the report.

MR. SCHULTZ: First of all, I want to find out when he got there and if he saw the accident.

THE COURT: He is not being asked to testify as to the accident, is he?

MR. SCHULTZ: If he didn't see the accident --

THE COURT: I am familiar with the law. I don't have to be lectured on it.

Is that what it is being offered for, how it happened, or the names of the people?

MR. SCHULTZ: I don't know what he is offering it for, but if he offers the whole thing, the whole thing is in.

THE COURT: Then take a look at it.

MR. SCHULTZ: I have.

THE COURT: Does it describe the happening of the accident?

MR. SCHULTZ: Of course, your Honor.

THE COURT: Then I will rule it out.

MR. LASSOFF: If your Honor please, the description is not in his words, it's conversations with the bus driver and Mr. Chiarello, both of whom are parties.

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THE COURT: I'm sorry. I won't let it in.

DIRECT EXAMINATION (CONTINUED)

BY MR. LASSOFF:

Q Now, when you got --

THE COURT: I will let him refresh his recollection as to the names of the people involved.

That you have no objection to, do you, Mr. Schultz?

MR. SCHULTZ: No, sir, none at all, if it in truth refreshes his recollection.

Q Did you read this report before you took the stand?

A Yes, sir.

Q Can you tell us the names of the people who were involved?

A Vehicle number one --

MR. SCHULTZ: If your Honor please, I will respectfully object. It is obvious he is reading.

THE COURT: He is asking you for the names. That's all you have to tell us.

A -- Ingeman A. Larsen; vehicle number two, Thomas Chiarello; vehicle number three, Henry Girdwood.

Q When you looked at that report, did that refresh your recollection in some way?

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MR. SCHULTZ: Objection, your Honor.

THE COURT: You are not going to get it in that way.

MR. LASSOFF: I don't want to get it in.

THE COURT: Then why did you ask the question? The man wasn't there. He is entitled to tell you what he saw when he got there.

Q What did you see with relation to the cars? And I refer specifically to damage to the vehicles.

A Three vehicles - one, two, three - against each other.

Q Did you inspect these vehicles for damage to the vehicles?

A Yes, sir.

Q What did you notice with regard to Mr. Chiarello's car?

A Can I read the damage report here?

THE COURT: I will let it in.

A Rear trunk and bumper damages, front seat broken --

THE COURT: Is this Chiarello's car?

MR. SCHULTZ: May I respectfully object at this time?

THE COURT: Overruled.

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A Front seat broken, right front fender damaged, right front headlight broken.

Q When you got to where the cars were, did you notice in what position the right front seat of Mr. Chiarello's car on the driver's side was?

A It was broken and bent backwards.

Q Was there any damage that you observed and reported with regard to the bus?

A Dented bumper; dented front bumper.

Q Was there any damage to vehicle number one, the vehicle in front of Mr. Chiarello?

A Yes. Dented rear trunk and bumper, broken right taillight.

MR. LASSOFF: No further questions.

MR. SCHULTZ: May I see that, please, sir?

(Document handed to Mr. Schultz.)

CROSS EXAMINATION

BY MR. SCHULTZ:

Q Sir, are you familiar with the -- withdrawn.

Did this accident, when you got there -- where was it in relation to the trestle?

A This accident was on the approach road to the bridge.

Q Was the trestle towards the Jersey side or

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towards the Staten Island side from the scene of the accident?

A The testle would be on the Bayonne side.

Q Towards the Jersey side?

A Right.

Q How far past the testle was it when you got to the scene of this accident?

A Where was the accident in relation to the trestle?

MR. LASSOFF: I object unless we establish these vehicles had not been moved at the time he got there.

THE COURT: He said they were touching together when he got there.

MR. LASSOFF: Fine.

THE COURT: That was in answer to your question.

MR. LASSOFF: I didn't hear it. I'm sorry.

A I'm sorry. I forgot the question.

THE COURT: How far was this cluster of cars from the trestle when you got there?

THE WITNESS: I'd say 150 yards, maybe.

Q Yards?

A Yards from the trestle.

Q And at the point where this accident -- when you got there, when you saw the cars, what was the terrain at that scene?

A It would be a slight incline onto the bridge.

Q In other words, from the trestle it would be an upgrade?

A From the trestle you would come up, go level and then start up on a slight grade.

Q The point where this occurrence took place, was it an upgrade?

A Slight upgrade.

Q Sir, did you go back -- incidentally, did you go back to the trestle at all?

A I had nothing to do. I didn't go back there at all. This would be Bayonne property. I had no reason to go back to the trestle.

Q Where the scene of this occurrence took place, sir, was it Port Authority, this ramp, Bayonne or state?

A Port Authority property.

Q Where the occurrence took place?

A Yes, sir.

Q And the point where the trestle is you say that's Bayonne?

A That's Bayonne, Hudson Boulevard.

Q In order to get to the point where the accident occurred, one had to go underneath that trestle, is that true?

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A Yes.

Q And underneath that trestle, sir, is there a dip, in other words --

A Yes, there's a dip.

Q How wide is that dip, do you know?

A Well, the width of the roadway.

Q Under the trestle. Give me the distance underneath the trestle that there is this dip.

A The length of the dip?

Q The length of the dip.

A Twenty feet, maybe.

Q How wide is the trestle? How many trains can go on the trestle, do you know?

A I couldn't say.

THE COURT: When you say the dip under the trestle is 20 feet, do you mean from the time you come into it until the time you come out of it?

THE WITNESS: I'd say under the trestle part alone would be 20 feet.

THE COURT: Does the dip last longer than the trestle? If this is the road and this is the trestle, where does the dip start -- outside the trestle, under the trestle?

THE WITNESS: Outside the trestle, underneath

the trestle and then grade up.

THE COURT: How long a distance is the dip from the time it starts to the time it comes out, not just the portion under the trestle?

THE WITNESS: I'd say a hundred feet, 120 feet, something on that order.

BY MR. SCHULTZ:

Q What were the weather conditions when you got there, sir?

A It was raining.

Q Actual rain?

A Yes, sir.

MR. SCHULTZ: No further questions.

REDIRECT EXAMINATION

BY MR. LASSOFF:

Q Mr. Hutchings, I show you this photograph -- I think it is marked as Plaintiffs' Exhibit 1 for identification, your Honor, already -- and I ask you if this photograph fairly and accurately shows the trestle and the roadway, access roadway, to the Bayonne Bridge as it existed on June 30, 1972?

A Yes, sir.

MR. LASSOFF: I offer that photograph in evidence.

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MR. SCHULTZ: At this time, your Honor --

THE COURT: Show it to Mr. Schultz.

(Pause.)

MR. SCHULTZ: May I have some questions on this, your Honor?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. SCHULTZ:

Q Do you know when this picture was taken?

A No, sir.

Q Do you notice that there is snow on the side there?

A It looks like there may be a little snow on the top of the bushes here.

THE COURT: Keep your voice up.

THE WITNESS: I'm sorry.

Q There wasn't snow on the ground in June of '72, was there?

A No, sir.

Q Sir, is this picture in the Bayonne area, as you say?

A This is Bayonne, yes, sir.

Q Is that within your jurisdiction?

A No, sir.

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Q Are you familiar with that area?

A Yes.

MR. SCHULTZ: If your Honor please, at this time I want to make an objection, but I think it would be best outside the hearing of the jury.

THE COURT: Come over here.

(At side bar.)

MR. SCHULTZ: May I suggest, your Honor, perhaps it would be best in the robing room?

THE COURT: I always hold side bar conferences here at the side bar.

MR. SCHULTZ: If your Honor please, I can't remember whether my objections to these pictures were placed on the record yesterday or whether it was not on the record. I just don't remember.

THE COURT: They are on the record.

MR. SCHULTZ: And the fact the markings have been removed from the prior trial, your Honor.

I am going to object, first of all, to removal of the markings.

THE COURT: I ruled on that yesterday.

MR. SCHULTZ: I know that. I am going to object to the use of these pictures at this time first on that basis, and secondly on the basis this was taken only some

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time when there is snow and doesn't reflect the lighting conditions or atmosphere or anything at the time of the occurrence.

THE COURT: That is not what he is being asked about. He is being asked whether it accurately reflects the physical distances.

MR. LASSOFF: The distances.

THE COURT: Not whether there is snow on the ground or not.

MR. SCHULTZ: This is a poor quality picture. If anybody can tell distances from that picture --

THE COURT: The witness says he can.

MR. SCHULTZ: All right, sir. I respectfully object.

(In open court.)

THE COURT: The picture was offered as Plaintiffs' Exhibit 1. It is received.

MR. LASSOFF: You will have to remark that.

THE COURT: The photograph you have in your hand is received as Plaintiffs' Exhibit 1 in evidence.

(Plaintiffs' Exhibit 1 was received in evidence.)

BY MR. LASSOFF:

Q Sir, when you went to the scene of the accident,

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did you make a sketch as to where the accident occurred on your accident report?

A This is the finished accident report. I made a rough sketch.

Q But this is signed by you and prepared by you?

MR. SCHULTZ: Objection, your Honor.

THE COURT: He said no in answer to your question.

Q You made a rough accident report and then did you make a finished accident report?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

A Yes, sir.

Q Is that your finished accident report?

A Yes, sir.

Q Is that your sketch?

A Yes, sir.

Q I notice that in your sketch --

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Ask him a question.

Q Does that sketch accurately reflect the position of the cars which were touching each other at the time you got to the scene of the accident?

A Yes, sir.

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Q Does it actually reflect the condition and the place in the roadway where the cars were?

A Yes, sir.

Q In that sketch that you made, did you put a dot alongside where the cars were to indicate any particular object?

A I have a lamppost marking here.

Q And that dot in that sketch --

MR. SCHULTZ: If your Honor please, I will respectfully object.

THE COURT: Ask direct questions. He is your witness.

Q Did the accident occur somewhere near that lamppost?

A Yes, sir.

Q Or street light?

A Yes.

Q Is it a street light?

A A lamppost.

Q I show you this photograph --

THE COURT: Mark it first for identification.

xx (Plaintiff's Exhibit No. 9 was marked for identification.)

Q -- and ask you if it fairly and accurately

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represents the place where the accident happened and the lamppost that you have in your diagram?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A This is the area, yes, sir.

Q And is that the lamppost?

A I couldn't say offhand. There seem to be two lampposts.

Q But it is the area where the accident happened?

A Yes, sir.

MR. LASSOFF: May I offer that picture into evidence?

MR. SCHULTZ: Objection.

THE COURT: Same objection you gave at the side bar? He says the photograph accurately reflects the place where the accident occurred.

MR. SCHULTZ: Same objection I gave at the side bar.

THE COURT: Same ruling.

(Plaintiffs' Exhibit No. 9 was received in evidence.)

Q I show you --

MR.LASSOFF: May we mark this for identification.

:xx

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(Plaintiffs' Exhibit No. 10 was marked for identification.)

Q I show you this photograph, Plaintiffs' Exhibit 10 for identification, and I ask you if that fairly and accurately shows the place where the accident occurred?

A This shows the entrance to the access road going onto the bridge.

Q Is that where the accident occurred?

A Not in this area. It would be up further.

THE COURT: He says that doesn't reflect.

MR. SCHULTZ: What was that exhibit marked?

THE COURT: 10.

MR. SCHULTZ: 10 for identification?

THE COURT: Yes.

MR. LASSOFF: Would you mark this for identification.

(Plaintiffs' Exhibit No. 11 was marked for identification.)

Q I show you this photograph and I ask you if this photograph fairly and accurately shows the area where the accident occurred?

A Yes, it does.

MR. LASSOFF: May I offer that photograph in evidence, your Honor?

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THE COURT: Show it to Mr. Schultz.

MR. SCHULTZ: If your Honor please, may I have some questions on this?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. SCHULTZ:

Q Mr. Hutchings, is it?

A Yes.

Q You were asked whether this shows the area where the occurrence took place. Of course, sir, I take it that -- does this picture show snow and a car there?

MR. LASSOFF: Your Honor, it is not being offered to show the weather conditions.

THE COURT: That's right.

MR. SCHULTZ: I just want to ask him about that, your Honor.

THE COURT: He has already admitted this.

MR. SCHULTZ: This is another picture.

THE COURT: I assume they were all taken at the same time, Mr. Schultz, not weeks apart.

MR. SCHULTZ: I don't know, your Honor.

Q Is there snow on here?

A It looks like there could have been a snow covering, yes.

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Q And, sir, in this picture here when you say it shows the area where the occurrence took place, naturally that car wasn't there, is that right?

A At the time of the accident?

Q Yes.

A Naturally, no.

Q And, sir, would you tell us -- all right.

MR. SCHULTZ: Same objection as before, your Honor.

THE COURT: Same ruling.

(Plaintiffs' Exhibit No. 11 was received in evidence.)

BY MR. LASSOFF:

Q Sir, looking at that photograph, does that photograph show the lamppost that you put down in your diagram?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A The near lamppost wouldn't be the one. The one in the rear would be.

Q Would you put a circle with a P for post on the lamppost you say is the lamppost in your diagram.

(Witness writes.)

A You can see the top of the post.

Q Now, could you put three X's on this photograph

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showing the approximate position of the two cars and the bus at the time when you got to the scene of the accident?

MR. SCHULTZ: If your Honor please, may I suggest that he designate them 1, 2 and 3; 1 Larsen, 2 Chiarello and 3 the bus?

THE COURT: All right.

(Witness writes.)

Q Incidentally, sir, have you ever seen these photographs before taking the stand today?

A No, sir.

Q Now, when you got to the scene of the investigation, did you inspect the roadway around where the accident happened?

A Yes, sir.

Q Did you see any skid marks at all in the area around where the accident happened?

A Yes.

Q Where were they?

A Back of the bus.

Q Now, are you familiar with what causes skid marks?

A Stopping of the wheel, friction against the roadway.

Q And in order to do that, must the brakes work?

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MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Sustained.

Q What causes the stopping of the wheel?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Sustained.

Q Are you familiar with the operation of buses and motor vehicles generally?

A Yes.

Q Is there only one cause for a wheel being stopped on a bus?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Sustained.

Q Incidentally, after you took all the information did you make a determination as to what caused this accident?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q Was it part of your job to make such a determination?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q Now, at the point where the accident occurred, is there only one lane of traffic for vehicles going on the bridge or more than one?

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MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A Two lanes of traffic.

Q And does one lane go on the bridge and one somewhere else?

A Both go onto the bridge.

Q Is there an exit at the point where the accident occurred for vehicles that don't want to go onto the bridge?

A If you reached that area, the approach road, there is no way of turning back. You got to proceed over the bridge.

THE COURT: Let's get this straight, Officer. I gather that you have placed this accident on the approach road, is that correct?

THE WITNESS: That's correct, sir.

THE COURT: That means they had gone beyond where you could turn off to your left?

THE WITNESS: Yes, sir.

THE COURT: There was no turnoff at the point?

THE WITNESS: That's right.

THE COURT: Any car that had reached that point had tc continue onto the bridge?

THE WITNESS: Yes, sir.

Q I show you this photograph and ask you if on

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the left of the photograph there is not a cut for cars wanting to exit right over here?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

A There is no exit on this picture where you could turn left or right to get off the bridge at all.

Q What is the exit there for, if there is an exit?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: First of all, is there one?

MR. LASSOFF: I said if there is.

A I don't see any exit.

Q You don't see any?

A No.

Q Incidentally, did you retire from the Port Authority?

A Yes, sir.

Q How soon after this accident did you retire?

A Approximately a month.

Q About a month. Have you been in this area since this accident occurred, since you retired a month after the accident, at all?

A I would say no.

MR. LASSOFF: No further questions.

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RECROSS EXAMINATION

BY MR. SCHULTZ:

Q You told us, Officer, with relation to Plaintiffs' Exhibit 11 there were two lanes to go onto the bridge, is that correct?

A That's correct.

Q Sir, is there any wall there?

A There is a divider wall.

Q A divider, but that's not a wall, is it, it's a curb?

THE COURT: He said a wall.

Q How high is this curb?

THE COURT: How high is the wall.

MR. SCHULTZ: Sir?

THE COURT: He said it was a divider wall.

Q How high is it?

A Three foot, I imagine.

Q Three foot?

A Three foot.

Q And there are two lanes?

A Two lanes onto the bridge.

Q Sir, at the point where you have marked on Exhibit 11 where this occurrence took place, there is an upgrade, is there not?

A A slight upgrade, yes, sir.

Q Now, sir, you told us that you were familiar with the area of Plaintiff's Exhibit Number 1, is that right?

A Yes, sir.

Q Which is the trestle?

A Yes, sir.

Q And are you familiar with the roadway under the trestle?

A Yes, sir.

Q Now, you told us that you had never seen these pictures before, is that right?

A That's right, sir.

Q However, did you talk to Mr. Lassoff before you got on the stand?

A This morning, yes, sir.

Q For how long did you talk to him?

A Twenty minutes, I guess.

Q And did he mention to you or suggest to you in any way that he might show you some pictures?

A Yes, he did.

Q And did he say to you that if he were to ask you -- did he show you these pictures and did he say to you if they accurately portrayed the scene that you might

consider whether they did or not?

A I don't understand your question.

Q Did he say to you he might show you some pictures?

A Yes, sir.

Q Did he say to you if they accurately portrayed the scene you were to reply in the affirmative?

A Yes, sir.

Q In other words, you discussed these pictures and you knew you were going to be asked did they portray the scene, isn't that true?

A He said he had pictures of the scene, yes, sir.

Q Did he tell you he was going to ask you about them?

A Yes, sir.

Q And, incidentally, did you come here pursuant to a subpoena?

A Not direct subpoena. They sent the subpoena to the Port Authority.

Q You weren't working for the Port Authority, were you?

A At this time, no, sir.

Q You weren't served with a subpoena personally, were you?

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A Personally, no.

Q Did you come pursuant to a phone call by the plaintiff or somebody from his office?

A Came to see me yesterday.

Q They came to talk to you?

A To show me the accident report.

Q Somebody came?

A Yes, sir.

Q And you discussed it, right?

A Yes, sir.

Q Who was that that came from the plaintiffs' attorney's office?

THE COURT: I don't think that's necessary.

MR. LASSOFF: I will concede it was John Yodice, an investigator, your Honor, if it's important.

Q Was any discussion held with you before you got on this stand as to the condition of the roadway under the trestle?

A Yes, sir.

Q Were you told I might ask you about it on cross-examination?

A I can't say. He might have, yes.

Q Did they tell you, whoever it was, they weren't going to ask you about the condition of the roadway under

the trestle but they were going to leave it for cross-examination?

A No, sir.

Q Did you go back and look at that condition under the trestle?

A No, sir.

Q Do you know what the condition was?

A At the time?

Q Yes.

A No, sir.

Q Sir, so that there is no question, when you got to the scene of the occurrence, it was raining, isn't that correct?

A Yes, sir.

Q Would you tell us was it raining hard?

A At the time I would recollect a steady rain.

MR. SCHULTZ: No further questions.

REDIRECT EXAMINATION

BY MR. LASSOFF:

Q Were you brought to my office today by the same man who came to see you yesterday?

A Yes.

Q On the way walking towards the court, did I have any file with me?

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A I think you were carrying something. I don't recall.

Q The Port Authority report?

A Right.

Q Anything else?

A No, sir.

Q Now, on the way over here, did I ask you whether you had passed through that trestle on your way to the scene of the accident?

A I think you did, yes, sir.

Q Did you tell me you had no recollection?

A Yes, sir.

Q Sir, I want you to assume that the bus driver in this case has previously testified that underneath this trestle there was a pool of water some nine inches deep --

THE COURT: Sustained.

MR. LASSOFF: No further questions.

THE COURT: You may step down.

(Witness excused.)

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THE COURT: Next witness.

MR. LASSOFF: Dr. Lanier.

MR. SCHULTZ: If your Honor please, at this time the plaintiff was originally on the stand.

THE COURT: That's right. Put the plaintiff back on. Let's finish with the plaintiff.

THE COURT: We have stopped twice for the plaintiff. He hasn't finished his direct.

MR. LASSOFF: If your Honor please, I have one doctor here now who was here --

THE COURT: You wasted time all day yesterday saying you had one doctor here and another doctor shows up, now you have another one. We haven't finished the plaintiff's direct testimony, unless you are going to say you are finished.

MR. LASSOFF: No, I have not finished.

THE COURT: Then put him back on the stand.

MR. LASSOFF: Doctor, would you excuse me for a few minutes, please.

T H O M A S J. C H I A R E L L O, resumed.

THE CLERK: Mr. Chiarello, the Court wishes you to know you are still under oath.

DIRECT EXAMINATION CONTINUED

BY MR. LASSOFF:

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Q Mr. Chiarello, I show you these income tax forms and W2 forms for the years 1969 through 1972 and I ask you if those are your forms and your W2 forms.

A Yes, sir, they are.

MR. LASSOFF: I offer them in evidence, your Honor.

THE COURT: Show them to Mr. Schultz.

(Pause)

MR. SCHULTZ: If your Honor please, I respectfully object to the income tax returns, your Honor. First of all, they are copies.

THE COURT: The originals I assume are with the Internal Revenue Service.

Just one moment, sir. They are copies. Some of them are unsigned by the plaintiffs. I don't know whether these were the final forms or not. The income tax return for 1971 does not have a W2 form on it.

The only thing we are interested in is the income and that is on the W2.

MR. LASSOFF: Yes.

THE COURT: We will take the W2 forms.

MR. LASSOFF: One of the years is missing. He couldn't locate the W2 for 1971.

THE COURT: Let me see all of them.

(Handed to the Court)

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THE COURT: There is no way of telling from the '71 return what the wage income was.

MR. LASSOFF: Except it is listed under earnings, your Honor.

THE COURT: It is lumped.

I will let the witness testify orally as to what it was.

Take the W2 forms off and mark them.

THE CLERK: '69, '70 and '72.

THE COURT: Mark it in evidence.

xxx (Plaintiff's Exhibit 12 received in evidence.)

THE COURT: Those are the W2 forms for 1969, 1970 and 1972.

Q Mr. Chiarello, can you tell us what you earned in the year 1971?

A No, sir, I cannot.

Q If I show you this tax paper, would that refresh your recollection? Just what you earned, Mr. Chiarello, is all we are asking you about.

A Beg pardon, sir?

Q Just as to what you earned.

A In the area of $16,000, sir.

Q Fine. And were you working for the same employer in 1971 that you were in 1972?

A Yes, sir, I was.

Q And in 1970?

A Yes, sir, I was.

Q And in 1969?

A Yes, sir, I was.

Q Incidentally, is all of the income on your income tax returns your own earnings?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A Is it all my earnings?

Q Yes. I am talking about wages.

A Wages, yes.

Q Your wife did not work before this accident, did she?

A No, sir.

Q Did she work after the accident?

A Yes, sir, she did.

Q Mr. Chiarello, you testified yesterday, I believe, the last question, that you had not returned to work at all since this accident.

A That's correct, sir.

Q Did you continue to receive your salary for some period of time after the accident?

A Yes, sir, I did.

Q And how long was that?

A The accident occurred June 30, '72. I received base salary until 1 January, '73. That was six months, sir.

Q When you say base salary, does that mean that in addition to a base salary you got remuneration for other work?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Ask him what is meant by base salary, Mr. Lasoff.

Q What is your base salary?

A My base salary is what I --

MR. SCHULTZ: Objection, your Honor. We don't know when.

THE COURT: At that time.

Q What was your base salary at the time of this accident?

A At the time of the accident, I can't give you a figure, sir, if that's what you are asking.

THE COURT: What is meant by base salary?

THE WITNESS: My weekly salary, sir. No overtime.

THE COURT: Base salary is weekly salary without overtime?

THE WITNESS: Yes.

Q At the time of this accident did you work overtime?

A Yes, sir.

Q And what, if any, overtime did you get paid for?

A Saturdays and Sundays.

Q If you worked Saturdays or Sundays you got paid additional money?

A Yes, sir, we did.

Q And what was that?

A $50 per day additional.

Q The money that you got after the accident was just the base salary and no overtime, is that correct?

A That's correct, sir. I was not working so they just paid me my base salary.

THE COURT: Do you have any idea what that base salary was?

THE WITNESS: At the time of the accident?

THE COURT: Yes.

THE WITNESS: No, I do not.

MR. LASSOFF: We have some other records.

THE COURT: All right.

Q After January 1st of 1973, did you ever receive any salary from your employer?

A No, sir, I did not.

Q Have you ever received any salary from anybody after that date?

A No, sir, I have not.

Q Now, would you tell us what, if any, work you did around the house prior to this accident?

A Cut the lawn, took care of the pool, took care of cleaning the house, the back yard, repairs to the house, taking out the garbage, sweeping the sidewalks, washing them down, cleaning the snow off when it snowed, salting the driveway down, the general things you do when you have a home like that.

Q Prior to this accident did you engage in any recreation or sporting activities?

A Yes, sir, I did.

Q Tell us about that.

A I was umpire for Staten Island Little League in Great Kills, I assisted in coaching on my son's football team. It was just a complementary job they gave me. I was there all the time and they needed some help so they used to ask me to come over and help them.

Q What, if any, activities did you participate in with your children before this accident?

A Anything they did.

MR. SCHULTZ: Your Honor, I will object at this point.

THE COURT: Overruled.

A Sleigh riding. When they went sleigh riding I took them sleigh riding, horseback riding, miniature golf, sports activities. It was more my son at that time in sports activities, baseball, football.

MR. SCHULTZ: If your Honor please, may I respectfully object. There is no cause of action in behalf of these infants.

THE COURT: True. Strike what he was able to do before the accident and I assume the next question is what could he do after the accident. Objection is overruled.

A The general horsing around when you have young children of that age, playing around, fooling around, growing up with your children, more or less.

Q Mr. Chiarello, in order for your son to participate in the Little League in Staten Island, did you have to do certain work for the Little League?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained. Let's have the other side of the coin now.

Q What, if anything, have you been able to do with your children since this accident?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A It's been extremely limited now. I say the most

I have done with them now is go sometimes when my wife has a chance to drive me to go to their game and sit and watch them play whatever sports they happen to be in. There is no more fooling around with them, no more horsing around, no more teaching them baseball, football, soccer or whatever they do. It's just limited. It's not what I wanted to do.

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

Q Mr. Chiarello, prior to this accident what sort of relationship did you have with your wife?

A Very good. Good relationship.

Q I am referring now, Mr. Chiarello, to the part of marriage that deals with sex. Would you tell us about that?

A Yes, sir.

Q Before this accident.

A Prior to the accident, I had quite a satisfactory sex life, I think, on good terms. We got along quite well. Our sex life was very good.

Q Tell us approximately how often you and your wife would have relations prior to the accident.

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Two times, three times, four times a week.

Q Since this accident, Mr. Chiarello, would you tell us about your relationship with your wife. Has it changed in any way?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Yes, sir, it has, quite, quite dramatically.

MR. SCHULTZ: Move to strike it.

THE COURT: Overruled.

A We do not or we attempt to have relations now. Whenever I feel physically able to attempt it, we attempt it. It has not been satisfactory.

Q What does that mean, Mr. Chiarello?

A When you start the act, it is necessary for the man to move and when I move the pain becomes excruciating and I cannot continue the act because the pain is so great that I cannot keep an erection.

Q Have you or your wife ever had a satisfactory act of sexual intercourse since this accident?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A No.

Q Prior to this accident, how did you get along with your children?

A Excellent.

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Q What, if anything, has occurred between you and your children since this accident?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A We have -- I think they are scared stiff of me, to tell you the honest truth. I holler a lot. I don't have the patience that I had with them.

MR. SCHULTZ: Move to strike it, your Honor.

THE COURT: Overruled.

A It's been a constant apology on my part.

MR. SCHULTZ: May I suggest a recess, your Honor.

THE COURT: Do you want a recess, Mr. Lassoff?

MR. LASSOFF: I would request it.

THE WITNESS: I will be all right.

THE COURT: We will have a recess.

THE WITNESS: I'm sorry, your Honor.

(Recess)

THE COURT: You may proceed.

MR. LASSOFF: Thank you, your Honor.

BY MR. LASSOFF:

Q Mr. Chiarello, tell us about your job as a terminal superintendent for Universal. Will you tell us what the work was?

A Yes, sir. For Universal. I was in charge -- at

each pier I was on I was in charge of the trucks, their loading and unloading of the trucks, lighter operations, that is, loading and unloading of lighter operations. At certain piers I was in charge of also rail car operations. That is loading and unloading of the rail cars and working with the terminal yard men in order to set up on our siding whatever rail cars were necessary and also to make sure the cars were clean when they were finished.

I was directly in charge of all extra labor on the piers themselves, on the pier I was working on itself, and also in maintaining the cleanliness of the pier, too, and safety of the pier.

Q At the time of the accident, what pier were you in charge of or terminal?

A Bayonne Military Ocean Terminal at Bayonne.

Q Is a terminal a place where there are several piers?

A Yes. This has a tremendously large bulkhead all around the terminal where ships are berthed up alongside the bulkhead. It's not the normal shed affair that you would see at many of the piers in Brooklyn and New York. It's an open bulkhead and the sheds are, I'd say, 200 feet back from the bulkhead.

Q Are there railroad cars at that particular pier?

A Yes, sir, there are.

Q Now, how long had you been terminal superintendent at the Bayonne Military Ocean Terminal?

A To the best of my recollection, three, four months, maybe slightly more.

Q Prior to that, had you been terminal superintendent at another pier?

A Yes, sir.

Q And, incidentally, when did your employment change from American Stevedores to Universal Terminal and Stevedoring Corporation?

A 1 November, 1967.

Q From the date you started with Universal Terminal and Stevedoring Corporation, was your job with them always as a terminal superintendent?

A Yes.

Q Prior to November of 1967, had you been a superintendent with another stevedoring company?

A Yes, sir, I was.

Q What company was that?

A American Stevedore, sir.

Q And how long had you been a superintendent for American Stevedores?

A I got my superintendent's and hiring agent's license in 1961, when I came out of the United States Air Force.

Q And you said you got a license. Who gives you a license?

A The stevedore makes application to the Waterfront Commission.

Q The Bi-State Commission of New York and New Jersey?

A Yes, sir. You must be investigated prior to receiving your license.

MR. SCHULTZ: Objection. Move to strike.

THE COURT: Overruled.

Q Were you so investigated?

A Yes, sir, I was.

Q Did you get your license?

A Yes, sir. I got both licenses.

Q What are both licenses?

A One is a superintendent's license, one is a hiring agent's license.

Q While you were working for American Stevedores, was that your job, that of a pier superintendent, or did you have another job?

A Well, I started out with American in 1961 as ship superintendent at pier 10, Port Authority in Brooklyn. I was then elevated, I'd say, a year after to full pier superintendent. That's in charge of the whole pier.

A Is a pier superintendent's job a bigger job than a

terminal superintendent?

A Much bigger.

Q Did you continue with American Stevedores in that job until sometime when they merged with Universal?

A Merged?

Q Or were taken over by Universal?

A Yes, absorbed by Universal, yes, sir.

Q Was American Stevedores a company that was owned by relativies of yours?

A Yes, sir, it was.

Q Was your father one of the owners of American Stevedores?

A Yes, sir, at the time that Universal absorbed us he was president of the company.

Q Now, when this Universal took over or merged with American Stevedores, did you retain the same job?

A Would you repeat that, sir?

Q At the time of the merger when Universal took over, did you keep the same job you had before?

A No, sir, I did not.

Q Was the job you got more or less than the job you had at the time with American Stevedores?

A Lesser.

Q In going with Universal, did your salary increase, re-

main the same or decrease?

A If I might explain, sir, under the terms of the takeover by Universal all American superintendents were held at the same salary for one year from November 1, 1967, until November 1, 1968. At that time my salary -- I can only speak for myself at that time -- my salary at November 1, 1968, was decreased to bring me into a range with other Universal superintendents in that particular job.

Q When this merger took place, were the American superintendents given a one-year probation period by Universal?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q In any event, you continued to work for Universal Terminal and Stevedoring Company until the time of this accident?

A Yes, sir, I did.

Q Now, would you tell us -- you described your activities as a terminal superintendent. Would you tell us, to the best of your ability, what percentage of your work was manual labor and what part was clerical or administrative?

A A terminal superintendent does a minimal amount of clerical work. It doesn't vary more than five, ten percent of your entire time. I would say closer to five percent, sir.

Q And the rest?

A The rest is walking and manual labor, sir, and thinking.

Q In the course of your employment as a terminal superintendent, was it necessary for you to open and close doors of freight cars?

A Yes, sir, it was.

Q Is that a strenuous activity?

A It depends, sir on -- see, railcar doors slide. They slide this way and this way. They don't swing out. They have to slide. They slide on tracks. It would depend on what cargo was in there or what had accumulated in the tracks. At times they did become stuck and needed to either be pulled or you would use a hi-lo to give them a helping hand to push them open.

Q In the course of your activity as a terminal superintendent, was it necessary for you at times to lift and move cargo?

A Yes, sir, I did.

Q Will you tell us approximately the weights of your cargo which in the course of your regular employment you would have to move from time to time?

A Very general, Mr. Lassoff. I would say between one to 100 pounds. Anywhere in that area, sir.

Q At any time during any of the years that you were employed as a ship superintendent, pier superintendent or terminal superintendent, did you ever injure or hurt any part of your body?

A Never, never.

Q Sir, while you were in high school, did you play high school football?

A Yes, sir, I did.

Q Were you ever injured or treated for any injury you got while playing football or any other sports activity?

A To the best of my knowledge, no, sir, never.

Q Prior to this accident, had you ever had any trouble with your back, neck, right arm, right leg or any other part of your body except for some high blood pressure?

A Yes, I have a hiatus hernia.

Q How long did you have that?

A It's hard to say. It was only diagnosed in August of '73.

Q Prior to that time you didn't know anything about a hiatus hernia?

A No, sir.

Q Would you tell me -- continuing, Mr. Chiarello -- how this accident affected your relationwhip with your children?

THE COURT: We finished with that.

MR. LASSOFF: We stopped, your Honor.

THE COURT: We have been through that.

MR. LASSOFF: At this time I would like to offer in evidence the certified bills from the Golden Isles Hospital and Memorial Hospital in Florida.

Mr. Schultz has already seen them, your Honor.

THE COURT: Does he have any objection?

MR. SCHULTZ: I would like to look at them. I couldn't look at them while he was examining, your Honor.

(Pause)

MR. SCHULTZ: If your Honor please, I will have no objection to the Golden Isles Hospital bill, but I do object to all of these detailed things in the back. Would you like to see it, your Honor?

THE COURT: Yes.

Will you stipulate as to the total price, Mr. Schultz?

MR. SCHULTZ: The top is the total of all the others. That's why I think it is not necessary. Obviously it is done on a machine.

THE COURT: It is detailed charges.

MR. LASSOFF: I think it might be relevant to show the services performed on Mr. Chiarello's back.

THE COURT: I will let the whole thing in.

MR. SCHULTZ: Objection.

(Plaintiff's Exhibit 13 received in evidence.)

THE COURT: What is the other one?

MR. SCHULTZ: Two, your Honor.

Do you want to total these up?

MR. LASSOFF: I want separate submissions.

MR. SCHULTZ: These are not totaled. You don't have any total.

(Counsel confer)

MR. SCHULTZ: Okay.

No objection.

(Plaintiff's Exhibit 14 received in evidence.)

Q Mr. Chiarello, I show you these four photographs and I ask you if these photographs were taken by you.

A Yes, sir.

Q Can you tell us when those photographs were taken?

A In January of this year, sir.

Q Of this year?

A Yes.

MR. SCHULTZ: I didn't hear that.

THE WITNESS: In January of this year, sir.

Q Mr. Chiarello, I show you Plaintiff's Exhibit 1 in evidence and ask you if it fairly and accurately shows

the trestle --

THE COURT: Wait a second, Mr. Lassoff. What is the number of the Golden Isles exhibit?

THE CLERK: 13, your Honor.

Q If it fairly and accurately shows the trestle through which you passed prior to the occurrence of this accident.

A Yes, sir, that is looking back.

THE COURT: Looking back from where?

THE WITNESS: From the point of the accident, sir.

Q Would you put a T on that photograph where the trestle is?

A Yes, sir, I will.

THE COURT: On which exhibit?

MR. LASSOFF: Plaintiff's Exhibit 1 in evidence, sir.

(Witness writes)

A All right, sir.

Q I show you this photograph which is Plaintiff's 9 for identification and I ask you if it fairly and accurately show the place where the accident occurred.

A Yes, sir, it does.

MR. LASSOFF: Your Honor, I believe that was in evidence already but it is not marked that way.

THE COURT: Show it to Mr. Frezzo.

THE CLERK: 9 is in evidence, your Honor.

MR. SCHULTZ: May I see that?

THE COURT: 9 is in evidence.

Q Would you --

THE COURT: Show it to Mr. Schultz. He asked to see it.

(Plaintiff's Exhibit 9 handed to Mr. Schultz.)

THE COURT: Go ahead.

Q Can you show me on this photograph where your car was when the accident occurred? Make a circle for your car and put number 1 there. Put number 2 for you. Excuse me.

(Witness writes)

A Okay.

Q Would you put a circle with the number 1 on it where Mr. Larsen's car was at the time the accident occurred?

A Yes, sir (writing).

Q And would you put a circle with a number 3 on it showing where the bus was after the accident occurred?

A You are talking at the time of the accident, not after?

Q When it happened.

A Not after.

Q Excuse me.

(Witness writes)

Q Would you tell me, when you took that photograph, was that facing from Jersey towards the bridge or facing from the bridge towards the trestle, Plaintiff's Exhibit 9 in evidence?

A This is facing from the Jersey side towards the ramp itself. I'm on the access road looking up at the ramp.

Q I show you this photograph which is Plaintiff's 11 in evidence and I ask you if that fairly and accurately represents the place where the accident occurred.

A Yes, you can see where it occurred.

Q Would you make the same circles and numbers showing the position of the cars and bus at that time.

(Witness writes)

A All right.

Q I show you Plaintiff's Exhibit 10 which has been marked for identification and I ask you if that photograph fairly and accurately shows theplace where the accident occurred.

A Yes. It's a little smudgy but it - yes.

Q Would you once again put the three circles, one for Mr. Larsen, two for you and three for the bus?

THE COURT: Wait a minute. That was excluded before.

MR. LASSOFF: This is another witness. He is saying it is the place.

THE COURT: You haven't offered it yet.

MR. LASSOFF: Your Honor is perfectly right.

THE COURT: Mr. Schultz hasn't had a chance to object and I haven't had a chance to rule.

MR. LASSOFF: Okay. I offer this photograph in evidence, your Honor.

MR. SCHULTZ: If your Honor please, I am going to respectfully object at this time first on the grounds that one witness has already said it doesn't properly show the scene, secondly, your Honor, there have obviously been erasures on this photo.

THE COURT: Let me see it.

(Handed to the Court.)

THE COURT: On the statement by the witness that it is smudged, I will sustain the objection.

MR. LASSOFF: This is the end of my direct. May I call the doctor?

THE COURT: He has completed his direct examination.

MR. SCHULTZ: I take it that he wishes me to waive my cross at this point and put his doctor on.

THE COURT: That is what he is asking.

MR. SCHULTZ: I don't want to inconvenience the doctors.

THE COURT: Which doctor do you want to call?

MR. LASSOFF: Dr. Lanier, your Honor.

THE COURT: You may step down.

MR. SCHULTZ: Again, if your Honor please, I think before the doctor gets on the stand we should have a side bar.

THE COURT: All right.

(Witness temporarily excused)

(At the side bar)

MR. SCHULTZ: If your Honor please, I am going to respectfully object to calling Dr. Lanier. I have no reports from Dr. Lanier. The mere fact that he lists witnesses on a pretrial order to me, as I understand it, doesn't mean that he can call him unless he exchanges reports so we have some idea as to what's going on.

MR. LASSOFF: I have no report from Dr. Lanier, your Honor.

MR. SCHULTZ: This is twice now.

MR. LASSOFF: We have never been requested to exchange medical in this case at any time, your Honor.

THE COURT: It is a little difficult in a case where

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you are going to use medical proof to put a doctor on the stand with no report from him.

MR. LASSOFF: I don't have a report either. I don't know what he is going to say.

THE COURT: It was your duty to get one to properly prepare your case. That is the whole point of exchanging reports and names of doctors. It is so they can examine the doctor, the plaintiff, having before him those reports. I think it is unfair. I won't let Lanier testify.

(In open court)

MR. LASSOFF: Dr. Spitz, your Honor.

L. J A C K S O N S P I T Z, called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

MR. SCHULTZ: If your Honor please, I would like to place --

THE COURT: Same objection?

MR. SCHULTZ: Yes, your Honor.

THE COURT: Overruled.

DIRECT EXAMINATION

BY MR. LASSOFF:

Q Dr. Spitz, are you a physician duly licensed to practice medicine in the State of New York?

A I am.

Q Do you maintain an office for the practice of your profession?

A I do.

Q Where is your office located?

A 902 East 86th Street, Brooklyn.

Q Would you tell the Court and jury your professional training, education and background as a doctor?

A I went to the University of Alabama for my undergraduate school, then I went to the College of Medicine in Edinburgh, Scotland. Then I interned at Brookdale Hospital. I am in general practice.

Q Did there come a time, Dr. Spitz, where you examined the plaintiff in this action, Thomas Chiarello?

A There did, yes.

Q And when was that time?

A On July 3, 1972.

Q And was that examination conducted in your office?

A Yes.

Q Did you obtain a history from Mr. Chiarello as to the happening of this accident?

A I did.

Q What history did you obtain?

A He said on June 30, '72, he was driving a car

that was struck by a bus in the rear, forcing him to strike a car in front of him and gave a severe jolt to his neck and lower back.

Q Did you conduct an examination of Mr. Chiarello?

A I did.

Q And what did that examination consist of and what did you find?

A Well, I found that the forward flexion of his neck was limited and painful and he had marked spasm of the paravertebral muscles of his lower back and that forward bending was limited to 45 degrees.

Q Based on your findings, did you arrive at a diagnosis?

A At that time, yes, my impression was that he had acute torticollis which is spasm of the cervical spine of his neck.

And he had a severe low back derangement.

Q What is a low back derangement, Doctor?

A The lower back is deranged, it is like a mind being deranged. It is out of kilter.

MR. SCHULTZ: Objection.

THE COURT: That's his definition.

Q Now, Doctor, what, if anything, did you do for Mr. Chiarello on that day?

A Well, I ordered Robaxisal. Robaxisal is a muscle relaxant and medication, and I told him to get a plastic neck collar and I gave him physiotherapy to his neck and lower back.

Q Did you see Mr. Chiarello again?

A Yes. I saw him on the 5th of July of '72.

Q And what, if anything, did you do for him at that time?

A He got physiotherapy and I told him to continue with his Robaxisal.

Q On that second visit did you advise him to go back to his doctor in Staten Island for further treatment?

THE COURT: Instead of leading the witness ask him what happened next.

Q What else did you tell him?

A I asked him what was bothering him at the time, and he said he still had pain, marked pain, in his neck and his back. I didn't send him to anyone at that specific time.

Q Did there come a time when Mr. Chiarello returned to you?

A Yes, he returned. He returned on September 6th of 1972.

Q And what did he return for on that occasion?

A For more physiotherapy.

Q Did you obtain an interval history of his treatment by other physicians?

A Yes, I did.

MR. SCHULTZ: I will respectfully object, your Honor.

THE COURT: Sustained.

Q And what specific complaints, if any, did he have when he returned to you?

A He said he couldn't sit too long because of the pain in his back and his legs felt weak. He further said that he had pains in his back and there was a question at that time that he might be impotent, which was on January 6th of 1973.

THE COURT: Wait. The date is September 6, 1972. When is the next time you saw him after September 6th?

THE WITNESS: September 13th and September 20th.

THE COURT: What did you do for him then?

THE WITNESS: Physiotherapy to his neck and back.

THE COURT: When is the next time you saw him?

THE WITNESS: January 6, 1973.

THE COURT: What happened then?

THE WITNESS: He came in complaining he had pains in his back and that he was -- he thought he was impotent

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and he also complained of pains in his neck, throat.

THE COURT: What did you do?

THE WITNESS: I advised physiotherapy and I injected him with Vitamin E, 200 international units at the time, because some people -- it's not here but some people say that it is effective, not that it is but there was a request for it and it was worthwhile trying.

Q For what purpose, Doctor?

A To try to restore his sexual virility.

Q Doctor, when Mr. Chiarello returned to you in January of 1973, did he advise you that he had been in a hospital?

A I have a record of it, but he didn't tell me at the time. I have a record of it.

Q Would your records -- look at your records and tell me when he was in the hospital.

MR. SCHULTZ: Objection.

THE COURT: It is in the record now, isn't it?

MR. LASSOFF: Yes.

THE COURT: It's in the record.

MR. LASSOFF: All right.

Q Did he advise you that he had a myelogram performed in a hospital in Richmond, Virginia?

A I know about that because I had gotten a report of a myelogram from one institution.

Q Did you write that institution to obtain that report?

A No, I didn't write for it.

Q Did they send it to you?

A He may have sent it to me or they may have sent it to me.

Q You don't recollect now how you got it?

A I don't know how I got it.

Q Did you again institute a course of treatment for Mr. Chiarello?

A Yes. On January 13, 1973, which is a week later, he got physiotherapy and he got another injection intramuscularly of Vitamin E, and a week later, on the 20th, January 20, 1973, again physiotherapy and another injection of Vitamin E intramuscularly.

Q Now, did there come a time when you referred Mr. Chiarello to another doctor?

A Yes, I did.

Q Who did you refer Mr. Chiarello to?

A To a Dr. Benjamin Lanier.

Q What type of a doctor is Dr. Lanier?

A Diplomate, orthopedic surgeon.

Q For what purpose did you refer Mr. Chiarello there?

A To find out if anything could be done to improve his

back condition.

Q Were you advised by Dr. Lanier of what his examination revealed?

A Yes.

MR. SCHULTZ: Objection.

THE COURT: Sustained. Don't do that, Mr. Lassoff. I excluded Dr. Lanier because you didn't properly lay a foundation for his production here and you didn't properly advise your opponent of what the doctor was going to testify to, which is required by our practice. Don't try to get it in the back door because it is not coming in that way.

MR. LASSOFF: All right.

Q Following the examination by Dr. Lanier, did you continue treatment?

A Yes, I did. I did.

Q Tell us the dates of your treatment, what you did for Mr. Chiarello on those dates.

A On February 10, 1973, Mr. Chiarello got another injection of Vitamin E and I examined his urine for sugar because diabetics are prone to impotence and I wanted to rule that out as a possibility. I also --

Q Did you rule it out?

A Yes. He had no sugar. He said that his impotence had a slight improvement but not much. Then he came back on

February 17th. He got physiotherapy to his neck and back and Vitamin E again intramuscularly. These injections with physiotherapy continued on the 24th of February, '73; March 3, '73; March 10, '73; March 17, '73. On the 17th of March, 1973, since his impotence was unimproved, I stopped the Vitamin E therapy.

Q Was he still complaining to you at that time of impotence?

A It was unimproved. That is the only way I would have known.

Then on March 24th of 1973 he got physiotherapy to his neck and his back and March 31st the same thing. April 7 similar, therapy to his neck and his back; on April 14th similar. April 21, '73, the same thing. This time I see here in my notes that on March 21, '73 -- can I say it -- he developed a weakness in his right hand. I also took his blood pressure which at that time was 150 systolic over 84. I advised him to reduce and also to cut down on his salt intake in his food.

On March 30, '73, he got physiotherapy for the reasons aforementioned. He kept getting similar therapy on April 5, '73; April 12, April 26, '73; June 4, June 9, June 16, June 23 of '73. Further therapy was on July 7, '73; July 14, '73, July 21 and July 30, the last time

I saw him for his condition.

Q The last time you saw him, July 30, 1973, what was his condition?

A Well, at that time it says here that his back symptoms were still present and that the prognosis as far as I was concerned to his back was poor and that he was totally disabled and there was a question mark in my own mind as to whether or not he had developed a herniated disc.

Q Doctor, from the time you first saw this man three days after the accident until the time you last saw him, was there any improvement in his condition?

A No, there wasn't.

Q Doctor, was the accident that Mr. Chiarello described to you on the third day after the accident the competent producing cause for the injuries you found him to be suffering with?

A It was.

Q During the entire period of time that you were seeing Mr. Chiarello, in your opinion was he totally disabled?

A Yes, he was.

Q What was the fair and reasonable value of your services to Mr. Chiarello, Doctor?

A Close to $400.

Q How close?

A How close? I have to do it slowly.

Q Would 350 be fair?

A 350 fair? Yes, 350 is fair.

MR. LASSOFF: Your Honor, may we approach the Bench for one moment?

THE COURT: You may.

(At the side bar)

MR. LASSOFF: I have both Dr. Urs and Dr. Leventhal on call for Monday morning. I assume your Honor's ruling is going to be the same since I don't have a report from either.

THE COURT: Obviously. The reason I allowed this doctor to proceed and overruled Mr. Schultz's objection is Mr. Schultz is completely familiar with this doctor's testimony having heard him at the last trial.

MR. LASSOFF: All I am making this for now is I have to call the doctors. I don't want a charge I failed to produce doctors I can produce. I had Dr. Lanier in court.

THE COURT: I assume there will not be any charge of failure to produce doctors.

Do you want any more?

MR. SCHULTZ: Sir?

THE COURT: You heard Mr. Lassoff.

MR. SCHULTZ: I really wasn't listening.

THE COURT: Why weren't you listening? He is on the subject of producing doctors.

MR. LASSOFF: I said since I can't use Dr. Lanier and I have Dr. Urs and Leventhal on call and ready to come in and I assume your objection will be the same as I have no reports from either, I have asked the judge to rule that he will not charge a failure to produce a doctor since he will not let the doctor testify based on your objection. Do we have that understanding?

MR. SCHULTZ: Certainly I can't have it both ways, but I truthfully --

THE COURT: It seems to me there is enough medical here with the treating Dr. Leone. What was missing in the last trial was the failure to call Leone.

MR. SCHULTZ: I objected to him, too, because I had no report from him.

THE COURT: He was a treating doctor, and that was the evil in the last trial. It is perfectly obvious he was going to be called at this trial. The other ones are so small, it seems to me, but if you are going to make any reference in summation to the failure to call Urs and --

MR. LASSOFF: Lanier and Leventhal.

THE COURT:--I will have to let him put them on.

MR. SCHULTZ: Then I won't do it.

(In open court)

MR. LASSOFF: You may inquire.

CROSS EXAMINATION

BY MR. SCHULTZ:

Q Dr. Spitz, may I see your records, please?

(Documents handed to Mr. Schultz)

A I pulled the staples out.

Q Dr. Spitz, you and I are not strangers to one another, are we?

A No, sir.

Q In fact, I have questioned you before, have I not?

A Yes, sir.

Q Doctor, first of all, sir, do you know any members of Mr. Chiarello's family?

A Yes, I do.

Q Who is that -- his father-in-law?

A His father-in-law.

Q Doctor, for how long have you known Mr. Chiarello's father-in-law?

A Five years.

Q And you knew Mr. Chiarello's father-in-law before he came under your care, isn't that true -- I mean before Mr. Thomas Chiarello came into your care you knew his father-

in-law?

A It depends. When was the accident? Is the accident closely related to the five-year period?

Q Could you tell me when the accident was?

A It is on the card. You have the card.

Q You don't remember when the accident was without the card, do you?

Q Without the card, yes, I do.

Q When?

A 6-20-72 or 6-30-72, is that correct?

THE COURT: Yes.

Q You get the brass ring, Doctor.

Doctor, you conducted a physical examination of this man, did you not?

A Yes, I did.

Q Doctor, you told us, I believe, that you took his blood pressure at one time and it was 150 over 84?

A That's correct.

Q Doctor, one of them is the systolic rate, is it not?

A That's correct.

Q One of them is the diastolic rate?

A Yes, it is.

Q Sir, in your opinion is 150 over 84 -- withdrawn, sir.

Between the last time I talked to you and today, your taking the stand, have you had any conversations with Mr. Lassoff or anybody from his office?

A For half a second. There was a gray-haired man who thought he knew me and he asked me if I was related to Spitz the florist, but nothing in relation to this case.

Q Doctor, this blood pressure of 150 over 84, sir, in your opinion is that high blood pressure?

A Not considered -- I would consider it mild.

Q Mild high blood pressure?

A Mild.

Q Doctor, did you also consider this man to be overweight?

A Well, I am going to make a statement that will be difficult here. The statement is this. When I sent him to Dr. Lanier he had told Dr. Lanier at one time --

THE COURT: No, what he told Dr. Lanier.

A No, he wasn't. In my opinion he was slightly overweight for his height.

Q Doctor, when I last questioned you, sir, didn't you tell us that this man had a diminished life expectancy --

MR. LASSOFF: Objection, your Honor. There is no such question.

MR. SCHULTZ: I am going to ask him.

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THE COURT: Why don't you ask him first before you ask him what you asked him before. The proper way is to ask him now. If it is inconsistent then ask him.

Q Doctor, did you know that this man smokes or did smoke at that time three or four packs of cigarettes a day?

A Yes, he did.

Q Have you spoken to him recently as to his smoking habits?

A No, I did not.

Q Sir, did you make any note of that on these records?

A There is a record there that I advised him -- nothing in relation to his smoking but in relation to his weight and to his salt intake.

Q Doctor, did you ever take his blood pressure again exc-pt on one occasion?

A I may have taken it but didn't record it.

Q Doctor, in your opinion, with this overweight condition that you have described, would you say that he is hypertensive?

A He is not a hypertensive if he maintains a weight loss.

Q When you examined him.

A When I examined him I wouldn't consider him hypertensiv

no.

Q Doctor, if the hospital records described him in December of '73 as being hypertensive, would you agree with that?

MR. LASSOFF: Objection, your Honor.

THE COURT: Sustained. The witness last saw him in July.

MR. SCHULTZ: May I see the Golden Isles record, please? And the other one with Sporn.

MR. LASSOFF: Here it is. It is on your desk.

(Documents handed to Mr. Schultz)

Q Did you know, Doctor, that in Plaintiff's Exhibit 2 the man had a blood pressure of 145 over 90 and that a doctor in that hospital record reached the conclusion that the man had hypertension related to overweight?

A Probably.

MR. LASSOFF: Objection to any other doctor's report.

THE COURT: Sustained.

MR. LASSOFF: I have no objection to what this doctor would say about that blood pressure.

Q Did you see that record?

A Yes.

THE COURT: It makes no difference. He is an expert

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and the other fellow is an expert. That is up to the jury.

Q Doctor, did you know -- did you ever see this record?

THE COURT: What record is that?

MR. SCHULTZ: This is Plaintiff's Exhibit number 5.

Q -- wherein a Dr. Treiber stated that the patient has hypertension and takes medication for it; did you know that?

MR. LASSOFF: Objection.

THE COURT: Sustained.

MR. LASSOFF: The question was did he ever see the record before.

Q Did you ever see that record, Doctor?

A I never saw that one.

Q But you have seen the other one?

A Yes.

THE COURT: I sustained objection to your question as to the other one.

Go on to something else.

MR. SCHULTZ: In other words --

THE COURT: I don't put one expert against another. You have the records in evidence, you have the witness' testimony. That ends it. Next question.

MR. SCHULTZ: Thank you, your Honor.

Q Dr. Spitz, in your opinion, with this man's blood

pressure as you know it, his overweight and his smoking of cigarettes at the rate you knew them to be, three packs a day, in your opinion, sir, would that diminish his life expectancy?

A I have to answer no, and I will tell you why if you ask me.

Q All right. Doctor, when I last examined you, did you render an opinion that it would reduce his life expectancy?

A I did not say that. You can look up the record. I never said that. No, I did not.

MR. LASSOFF: Objection.

THE COURT: Wait. The answer is no. The question is proper, the answer is no.

Q Now, Doctor, with relation to this impotency that you treated this man for, did you conduct any neurological tests with relation to that?

A There is nothing neurological that I could have done other than --

Q Did you conduct any neurological tests?

A No.

Q You didn't do it?

A No, I did not.

Q Doctor, in your experience, do men become impotent without trauma?

A Sure do.

Q Do men become impotent without an injury to their back?

A They do.

Q And, Doctor, as a doctor, which is a science, isn't that correct, the medical profession is a science, is it not?

A Yes, it is.

Q Sir, is it incumbent or is it good practice to exclude or make -- withdrawn.

Is it good practice to do a differential diagnosis before reaching a conclusion?

A No, it's not. I will tell you why.

Q Doctor --

A It's not.

Q Do you attempt to exclude, before reaching a diagnosis, various causes?

A I excluded the commonest cause.

Q Doctor, just answer my question, if you would, please.

A Yes, I attempted to exclude, yes.

Q Did you do a neuro -- you did not do a neurological on this man, did you?

A I did not.

Q Did you do a neurological with relation to any of his reflexes?

A No, I did not.

Q Did you take any X-rays?

A I advised X-rays.

Q Did you take any X-rays?

A No, I did not.

Q Did you ever receive any X-rays?

A Not in this case, no, I haven't seen any X-rays. I received a report on a myelogram, which are X-rays.

Q January of '73, isn't that true?

A Yes, but I didn't take any X-rays.

Q Do you know -- did you know whether there was any displacement or luxation in the cervical spine?

A The cervical spine was intact all the way. There was no luxation in the cervical spine.

Q Did you notice whether there was any loss of the curve?

A Cervical region?

Q Yes.

A There was no loss of curve in the cervical spine.

Q With relation to his back, did you notice whether or not there was any loss of curve in the back?

A Yes, there was.

Q Did you make a notation of it?

A Yes, I did.

Q Where?

A Well, when I said --

Q Where did you make the notation?

THE COURT: He asked you to show where.

A It says here, "He ha a marked spasm of his paravertebral muscles of the lower back."

When the muscles of the lower back go into spasm that creates a curve.

Q Doctor, do you have any indication there that there was a loss of the lordotic curve?

THE COURT: He said yes.

MR. LASSOFF: Objection.

A I said yes.

THE COURT: The spasm he says indicates that.

A The spasm causes a curve. The word "curve" is not there.

THE COURT: Your question is: is there any indication of it and he says yes.

Q Doctor, did you put anywheres on here there is a loss of a curve specifically?

A No, sir, I did not.

Q Did you put there was any flattening of the normal

lordotic curve?

A I said there was spasm.

THE COURT: He wants to know did you use those specific words.

THE WITNESS: I didn't use those specific words.

Q Doctor, I take it -- withdrawn.

You don't know how you got that myelogram report, do you?

A Yes, I do. I got it in the mail.

Q You don't know where it came from?

A Yes, I do. I have it here.

Q Who sent it to you?

A I will find out. I will look it up. I don't remember. I think it may have been Richmond Hospital or one of those places. I don't know. I remember it, it says here, "A lumbocervical myelogram done" --

THE COURT: The question is who sent it to you.

THE WITNESS: Probably the Union Mutual Life Insurance Company. Here it is. It was sent to me by Concord Neurological and Neurological Associates from Staten Island.

THE COURT: All right.

Q Doctor, do you have any other records other than this that you have given me?

A No, sir, just what was sent to me in the mail.

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Q Doctor, I believe you told us that you were treating him in September, you said, I think, September 13th, September 20th of '72?

A If the card says so.

Q I think that's what you said.

A Okay.

Q Can you show me on this card any record of treatment on September 20th and September 13th of 1972?

A Well, apparently the dates are there but it says "8" which I may have written as the month of September, but it's the 13th and 20th of September.

Q Does the record show you treated him in August?

A No, it just shows July and September.

Q Doctor, is August the eighth month or am I mistaken?

A August -- I am mixed up with that. August is the eighth month. September is the ninth month.

Q Does your record show you treated him in August as opposed to September?

A It was September, but I wrote eight instead of nine.

Q So your records are mistaken?

A Yes, it is. Yes, it is.

Q But you actually saw him in September?

A That's correct.